

On Death and Dworkin: a Critique of His Theory of Inviolability

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Articles

ON DEATH AND DWORKIN: A CRITIQUE OF HIS THEORY OF INVIOABILITY

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INTRODUCTION AND SUMMARY

Ronald Dworkin has proposed a new measure of human dignity, one that he calls "inviolability"¹ and that he correlates to the amount

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1. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 73 (1993) [hereinafter *LIFE'S DOMINION*].

of creative effort invested in each human being.² His book *Life's Dominion*³ insists that the more productive investment in each being, the more regrettable the killing of that being.⁴ His idea may well have a legal impact.⁵ Inferences based in part upon inviolability are, according to Dworkin, valid not only for all "Western political culture," but

2. *Id.* at 71-101.

3. See *supra* note 1.

4. LIFE'S DOMINION, *supra* note 1, at 71-101. This and other broad, introductory comments concerning *Life's Dominion* are documented in detail in the subsequent text of this Article.

Dworkin has not significantly modified, nor further developed, his position since the publication of *Life's Dominion*. His only subsequent book, *Freedom's Law: The Moral Reading of the American Constitution*, is almost exclusively an anthology of articles originally published prior to *Life's Dominion*. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter FREEDOM'S LAW]. Only the "Introduction," *id.* at 1, the chapter summaries, and one short "Addendum," *id.* at 143, are new. None of these deals with Dworkin's investment-based theory of inviolability. The main point of the thirty-eight-page introduction is to bring "political morality into the heart of constitutional law." *Id.* at 2. Dworkin adds that "political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the American system judges—ultimately the Justices of the Supreme Court—now have that authority" *Id.*

5. The views expressed in *Life's Dominion* have already begun to affect case law at the highest levels. Justice Stevens, in his concurring-dissenting opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 913-14 n.2 (1992) (Stevens, J., concurring), quoted Dworkin at length. *Id.* Stevens cited an earlier article by Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, that first developed core ideas later included in *Life's Dominion*. *Id.* (quoting Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 400-01 (1992)). The particular words quoted by Stevens were incorporated almost verbatim in *Life's Dominion*. LIFE'S DOMINION, *supra* note 1, at 113-14. Noting Justice Stevens's citation to his work, Dworkin avers that the *Casey* Court gave the right to abortion "a new and better foundation, along the lines that Chapter 3 [which had been previously published separately] . . . described." FREEDOM'S LAW, *supra* note 4, at 42. It is to be expected that someone of Dworkin's considerable lucidity and skill will have relatively great influence on the law, for "[w]e certainly do want influence to be unequal in politics . . . : we want those with better views, or who can argue more cogently, to have more influence." *Id.* at 27. See also Justice Sopinka's opinion for the majority, citing Dworkin, in *Rodriguez v. British Columbia* [1993] 3 S.C.R. 519, 585—a case dealing with the "right to die." Reasoning quite similar to that of Dworkin is at work in recent right-to-die cases in the United States as well. In the Addendum mentioned *supra* note 4, Dworkin repeats some of his central arguments from *Life's Dominion* in support of Judge Barbara Rothstein's ruling in *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, 79 F.2d 790 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996), holding that a Washington law forbidding physician-assisted suicide was unconstitutional. *Id.* at 1467.

Subsequent federal appellate court cases echo Dworkin's idea that some human lives are worth less than others, namely, those lives in which the investment has been "as substantially fulfilled as is anyway likely." LIFE'S DOMINION, *supra* note 1, at 88. Thus, the Second Circuit argues "[s]urely, the state's interest [in preserving someone's life] lessens as the potential for life diminishes." *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996). Like Dworkin (as we shall see), the Ninth Circuit has made much of

for "any nation dedicated to liberty."⁶ In the course of showing his inegalitarian concept of inviolability to be both dangerous and mistaken, I hope not only to lessen its influence, but also to find better answers to the new questions it raises.

Abortion made him do it. Dworkin's theory of inviolability is needed, he thinks, in order to make sense of the ambivalence many of us feel toward abortion.⁷ Here, too, Dworkin is wrong. Though not its primary concern, this Article will examine another way to understand the important ambivalence about abortion uncovered by Dworkin, a way recently taken by German law. Shortly after the publication of Dworkin's book, on May 28, 1993, the Constitutional Court of Germany issued an opinion holding that the inviolability of human dignity requires recognition of a constitutional right to life throughout pregnancy, but does not mandate criminal punishment for abortion.⁸

the analogy between the unequal value of fetuses and the unequal value of ill or elderly persons:

[W]e begin with the compelling similarities between right-to-die cases and abortion cases. . . . In right-to-die cases the outcome of the balancing test may differ at different points along the life cycle as a person's physical or medical condition deteriorates, just as in abortion cases the permissibility of restrictive state legislation may vary with the progression of the pregnancy. Equally important, both types of cases raise issues of life and death

Compassion in Dying, 79 F.3d at 800-01.

Judge Beezer, in dissent, raises questions similar to some of those discussed in this Article. He writes that we have been forced

to step back and reexamine the historic presumption that all human lives are equally and intrinsically valuable. Viewed most charitably, this reexamination may be interpreted as our struggle with the question whether we as a society are willing to excuse the terminally ill for deciding that their lives are no longer worth living. Viewed less charitably, the reexamination may be interpreted as a mere rationalization for house-cleaning, cost-cutting and burden-shifting—a way to get rid of those whose lives we deem worthless.

Id. at 856-57 (Beezer, J., dissenting). Further references to these two important appellate cases will be made at appropriate points in this Article. Dworkin coauthored an amicus brief in support of these two decisions before the United States Supreme Court. See *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41-42 (with an introduction by Ronald Dworkin) [hereinafter Dworkin, *Assisted Suicide: The Philosopher's Brief*].

6. LIFE'S DOMINION, *supra* note 1, at 166, 171. *Life's Dominion* is already being published in various other European languages. See, e.g., EL DOMINIO DE LA VIDA. UNA DISCUSION ACERCA DEL ABORTO, LA EUTANASIA, Y LA LIBERTAD INDIVIDUAL (Editorial Ariel ed., 1994). It has been published, or is forthcoming, in Italian, German, and French. Telephone Interview by J. Thomas Vetne with Professor Ronald Dworkin (Sept. 6, 1995).

7. LIFE'S DOMINION, *supra* note 1, at 10.

8. See Judgment of 28 May 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (Second Senate), 1993 EUROPÄISCHE GRUNDRICHTE ZEITSCHRIFT [EuGRZ] 229; see also Donald Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 15-32 (1994) (reporting the German court's holding that "[i]n the interest of preserving the value of unborn life, abortion must remain illegal, but the State need not punish the illegal act if the abortion takes place

As with the prior, similar holding that the court reaffirmed,⁹ this high court decision can be expected to have an important impact not only on Germany but also on the legal evolution of other nations, especially those with new or emerging constitutions.¹⁰

Not a review of Dworkin's book,¹¹ this Article focuses instead upon his pivotal idea: the inviolability of human life is a function of

within the first three months of pregnancy and after the State has had an opportunity to get the pregnant woman to change her mind"); Gerald L. Neumann, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995) (comparing the German court's decisions with United States decisions and summarizing the major features of the German opinion).

9. See Judgment of 25 February 1975, 39 BVerfGE 1 (First Senate) (F.R.G.), translated in Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551, 605-84 (1976). Despite important internal differences regarding the statutes before them, both the 1975 and the 1993 panels of the Constitutional Court agreed unanimously on two key points: the right to life protects the unborn and this right does not necessarily entail the penalization of abortion. See Jonas & Gorby, *supra*, at 645. Thus, the more liberal (dissenting) opinion in the earlier case begins with the following inclusion of the fetus under the protective umbrella of the constitution:

The life of each individual human being is self-evidently a central value of the legal order. It is uncontested that the constitutional duty to protect this life also includes its preliminary stages before birth. The debates in Parliament and before the Federal Constitutional Court dealt not with the *whether* but rather only the *how* of this protection.

Id. at 663.

The more conservative (majority) opinion in that same case acknowledges that the means of protection need not in principle include criminal sanctions:

Punishment . . . can never be an end in itself. . . . The legislature is not prohibited . . . from expressing the legal condemnation of abortion . . . in ways other than the threat of punishment. The decisive factor is whether the totality of measures . . . guarantees an actual protection. . . . It is not a question of an "absolute" duty to punish but rather one of a "relative" duty to use the penal sanction, which grows out of . . . insight into the inadequacy of all other means.

Id. at 646.

The essential difference between the 1975 and 1993 decisions is that the latter finds certain such "other means" potentially adequate and, therefore, constitutional, but without retreating from the affirmation of a fetal right to life. See Kommers, *supra* note 8, at 18. The 1993 dissents object neither to the unborn's right to life nor to the depenalization of abortion. For further discussion of the 1993 case, see *infra* note 328 and accompanying text.

10. For a discussion of the 1975 case's influence on Spanish constitutional law, see Richard Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AM. J. COMP. L. 513, 514, 525 (1987) [hereinafter *New Constitutional and Penal Theory*]. The permission for depenalization found in the 1993 decision has apparently been a factor in a recent effort to remove all punishment for early abortion in Spain. See *Documentación—España: Anteproyecto de ley Sobre Regulación de la Interrupción Voluntaria del Embarazo*, 5 CUADERNOS DE BIOÉTICA 235, 235-37 (1994) (reproducing a preliminary draft of a bill proposing that abortion be decriminalized in cases of grave danger to the mother, pregnancies resulting from sex crimes, severe fetal defects, or severe material personal problems—generally within the first 12 to 22 weeks).

11. *Life's Dominion* has already been widely reviewed in the legal literature and elsewhere. See, e.g., Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV.

the value of the creative efforts invested in it.¹² Arguing that this notion is both unfortunate and erroneous, I propose an alternative understanding of life's inviolability, one founded on respect for the human image or form.¹³ The German court decision of 1993 can be seen as using this idea of respect to reach a plausible political solution to the abortion conflict.¹⁴

Dworkin begins by positioning himself in the middle of the road in the abortion debate, aiming for a "settlement of the controversy . . . that will not insult or demean [either side], one that everyone can accept with full self-respect."¹⁵ Indeed, his arguments do borrow from

329 (1993) (book review); Alexander Morgan Capron, *Philosophy and Theory: Life's Sacred Value—Common Ground or Battleground?*, 92 MICH. L. REV. 1491 (1994) (book review); Stephen L. Carter, *Strife's Dominion*, NEW YORKER, Aug. 1993, at 86 (book review); Book Review, ECONOMIST, June 12, 1993, at 98; Robert P. George, Book Review, 88 AM. POL. SCI. REV. 444 (1994); Robert Grant, *Abortion and the Idea of the Sacred*, TIMES LIT. SUPP. (London), June 18, 1993, at 11 (book review); Abner S. Green, *Uncommon Ground*, 62 GEO. WASH. L. REV. 646 (1994) (book review); Daniel J.H. Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559 (1994) (book review); Russell Hittinger, *Getting It Wrong*, FIRST THINGS, Dec. 1993, at 53 (book review); Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160 (1995) (book review); Mary Kenny, *Once upon a Time*, HUM. LIFE REV., Summer 1993, at 31 (book review); Chris Naticchia, Book Review, 10 J.L. & POL. 339 (1994); Michael J. Perry, *The Gospel According to Dworkin*, 11 CONST. COMMENT. 163 (1994) (book review); Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049 (1994) (book review); John A. Robertson, *Autonomy's Dominion: Dworkin on Abortion and Euthanasia*, 19 L. & SOC. INQUIRY 457 (1994) (book review); T.M. Scanlon, *Partisan for Life*, N.Y. REV. BOOKS, July 15, 1993, at 45 (book review); Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1 (1994) (book review); Leon E. Trakman & Sean Gatien, *Abortion Rights: Taking Responsibilities More Seriously Than Dworkin*, 48 SMU L. REV. 585 (1995) (book review); Laurence H. Tribe, *On the Edges of Life and Death*, N.Y. TIMES BOOK REV., May 16, 1993, § 7, at 1 (book review); Book Note, *Inside out, Within and Beyond, or Backwards?*, 107 HARV. L. REV. 943 (1994). Most have been fairly mild in their criticisms. For example, even the Kenny piece in the anti-abortion *Human Life Review* declares the book "measured." Kenny, *supra*, at 36. Most of the reviews do not contain any substantial criticism of Dworkin's central, investment-based notion of intrinsic value. *But see* Kamm, *supra*, at 180; Rakowski, *supra*, at 2057-61. None has provided an adequate alternative solution to the paradox of intrinsic value so well delineated by Dworkin—the fact that we often respect life once it exists without wishing more life to come into existence. By contrast, this Article will show that Dworkin's investment theory deeply, erroneously, and unnecessarily injures human dignity, in that there exists a far more plausible and felicitous explanation of this apparent paradox.

12. LIFE'S DOMINION, *supra* note 1, at 84.

13. Rakowski's critique is closest to mine in its concerns. *See* Rakowski, *supra* note 11, at 2053, 2071-79. His analysis is different, however, and he does not elucidate the key counterconcepts of respect and image. *See id.*

14. *See* Kommers, *supra* note 8, at 20 ("Compulsory counseling, declared the Court, must be oriented toward the constitutional goal of preserving unborn life. At the same time, out of respect for the well-being and dignity of the pregnant woman, the counselors could not legally dictate the outcome of such counseling." (emphasis added)).

15. LIFE'S DOMINION, *supra* note 1, at 10-11.

the rhetoric of both sides. He agrees with the "pro-life" side that the "fetus"—a term he uses to include the unborn at every stage of pregnancy, including the embryonic¹⁶—is human and alive.¹⁷ According to Dworkin, "abortion means the extinction of a human life that has already begun,"¹⁸ and pre- and postnatal life share "sanctity" or "inviolability."¹⁹ Dworkin also adopts many of the stronger "pro-choice" assertions, including, for example, that laws against abortion impose "a kind of slavery"²⁰ on women.

Dworkin would have us grant the fetus an intermediate status, less than a rights-bearing person but more than a thing of no moral worth.²¹ One might say that he provides a pro-choice answer to a common ploy used by the pro-life side in debates: When supporters of abortion rights express any ambivalence about the procedure, such as a desire to make it "rare," their anti-abortion opponents are wont to ask simply, "Why? If the baby weren't a fellow member of the human community, why would you want to minimize abortion any more than other kinds of surgery?" Dworkin would respond that abortion is indeed regrettable, but only because of the inviolability of human life, not because the unborn child is an equal, rights-bearing member of our community.²²

Dworkin claims to be articulating the deep or true position of pro-lifers as well as of pro-choicers. That is, he argues that even those opposed to abortion are ambivalent about fetal rights.²³ They think of the fetus as more than property but less than an equal human being with rights.²⁴ Interestingly, one of his proofs is based on German constitutional jurisprudence.²⁵ Dworkin argues that in 1975 the German high court struck down liberalized abortion laws solely because those laws "did not sufficiently value human life," and thus were inconsistent with the anti-Nazi tenor of the 1949 Basic Law, not because the fetus

16. *Id.* at 5.

17. *Id.* at 22.

18. *Id.* at 33.

19. *Id.* at 73. "I use [the terms 'sacred' and 'inviolable']—and also the terms 'sanctity' and 'inviolability'—interchangeably," writes Dworkin. *Id.*

20. *Id.* at 103.

21. *Id.* at 73. That there are such intermediate entities or states of being can, of course, be controverted. Dworkin seems to claim that intrinsically valuable objects do exist, though he never appeals to natural law or otherwise explains how this can be possible. *Id.* at 69-70. For criticism of the modern tendency to reduce all value to subjective satisfaction, see Richard Stith, *A Critique of Fairness*, 16 VAL. U. L. REV. 459 (1982) [hereinafter Stith, *Critique of Fairness*]. See also *infra* note 95.

22. LIFE'S DOMINION, *supra* note 1, at 70-101.

23. *Id.* at 32, 94-97.

24. *Id.*

25. *Id.* at 64.

possesses a legal right to life.²⁶ Although Dworkin has to ignore much of the German court's language²⁷ in order to reach this conclusion, he is correct that the 1975 case seemed willing to minimize "rights-talk."²⁸ It did so, however, with regard both to the fetus and to the pregnant woman in the course of finding a viable middle ground in the abortion conflict.²⁹

Any apparent concessions to the pro-life side are ultimately reversed by Dworkin. He holds that the pro-lifers' fundamental principle, the inviolability of life, itself requires an abortion-rights regime more pro-choice than the United States Supreme Court's 1992 *Planned Parenthood v. Casey*³⁰ decision—indeed, even more pro-choice than the pre-*Casey*, post-*Roe v. Wade*³¹ jurisprudence of abortion—in that Dworkin would forbid waiting periods, limits on abortion funding, and any other state regulations motivated by a desire to protect the fetus from abortion.³² In other words, Dworkin's effort at political

26. *Id.*

27. For example, in interpreting the constitutional provision "Everyone has the right to life," the Court in 1975 concluded: "'Everyone' . . . is 'everyone living'; expressed another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being." Jonas & Gorby, *supra* note 9, at 638.

28. Perhaps more frequently than rights-related terminology, one finds the value-related, catch-all term *Rechtsgut* (legal good) used in the 1975 decision. See *id.* at 624, 667. This concept, of nineteenth-century origin, has been criticized by Spanish commentator Rafael Domingo for ultimately doing away with the legal distinction between persons and things. See Rafael Domingo, *El Aborto y el Tribunal Constitucional Alemán*, 21 REVISTA CHILENA DE DERECHO 273, 278-79 (1994). Although the 1975 German opinion explicitly avoided the issue of whether the unborn child is a "bearer" of (is able to "possess") a right to life, Jonas & Gorby, *supra* note 9, at 641-42, the 1993 decision repeatedly affirms that the fetus has its "own" (*eigenen*) right to life. See 88 BVerfGE, *supra* note 8, at 242, 251, 258. Thus, it may no longer be tenable to interpret German constitutional theory as relegating fetuses and fetal rights to an impersonal level of goods or values, as I (like Dworkin) sought to show in *New Constitutional and Penal Theory*, *supra* note 10, at 526-27. See also MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 38-39 (1987) (arguing that the Constitutional Court characterizes the "right to life" as a value of the community rather than something that belongs to the fetus).

29. LIFE'S DOMINION, *supra* note 1, at 64.

30. 505 U.S. 833 (1992).

31. 410 U.S. 113 (1973).

32. LIFE'S DOMINION, *supra* note 1, at 173. Dworkin argues explicitly against the holding of the *Casey* decision, *id.*, that a mandatory waiting period before an abortion is constitutional. *Casey*, 505 U.S. at 887.

Dworkin also advocates reconsideration of the cases decided between *Roe* and *Casey*, LIFE'S DOMINION, *supra* note 1, at 175, which held that federal and state refusals to fund abortion were constitutional. See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) (upholding a state act restricting "the use of public employees and facilities for the performance or assistance of nontherapeutic abortions"); Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that "a state that participates in the Medicaid program is not obligated under Title XIX [of the Social Security Act] to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde

settlement ends with an overwhelming victory for the pro-choice side.³³ One cannot help but wonder whether his clear political goal of more firmly securing abortion rights might not have skewed his broader theory of inviolability.

My critique of Dworkin is divided into two parts. In the first, I argue that the *results* of Dworkin's theory are unappealing. For example, despite his early promise,³⁴ Dworkin's argument does in fact "de-mean" individuals holding pro-life views. He accuses them virtually of bad faith, or at best of self-deception, for he claims that they do not really believe in fetal rights but only in fetal sanctity or inviolability.³⁵ When he then goes on to argue that the sanctity of life itself may permit and even require abortion,³⁶ Dworkin seems purposely to mock pro-life views. Dworkin's idea of life's inviolability thus contains no common meaning upon which civil peace could be founded. There is a more important result of Dworkin's theory that may not appeal to many. His weak idea of inviolability, together with his acknowledgment of the continuity of pre- and postnatal life, means that his justifications for abortion lessen legal and moral resistance to the killing of human beings after birth as well—particularly with regard to infants, the disabled, and the aged.

In the second part of my critique of Dworkin, I argue that both sorts of pernicious results—the harm to political compromise and the harm to certain classes of vulnerable postnatal human beings—are founded on an erroneous concept of sanctity or inviolability. Dworkin fails phenomenologically to understand both the object and the attitude involved in the inviolability of human life. He wrongly thinks that when we mourn the death of a newborn, for example, we regret

Amendment"); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (holding that there is "no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions"); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (holding that it is constitutionally permissible for a state to provide Medicaid benefits for abortions only if the abortions are medically necessary); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (holding that "Pennsylvania's refusal to extend Medicaid coverage to nontherapeutic abortions is not inconsistent with Title XIX" of the Social Security Act).

33. Many supposed efforts at abortion compromise appear, like Dworkin's, to be briefs for one side. See, e.g., LAWRENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (fully supporting the *Roe* approach). One of the rare exceptions, a book that clearly listens with sympathy to both sides, is *The Politics of Virtue: Is Abortion Debatable?* ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993).

34. *LIFE'S DOMINION*, *supra* note 1, at 10-11.

35. *Id.* at 32, 94-97.

36. *Id.* at 99 (stating that exceptions to prohibition of abortion "are based on respect for the intrinsic value of human life"). Dworkin also claims that euthanasia may further the sanctity of life. *Id.* at 196, 215.

primarily the waste of invested effort rather than the loss of the individual child herself.³⁷ He incorrectly claims that our attitude toward an infant who lives is largely one of valuing that investment rather than of respecting her life.³⁸ To the contrary, this Article will demonstrate that our attitudes toward human life cannot be captured by the idea of "valuing" at all; it will demonstrate that the respect or reverence we have for life is an entirely separate stance, unrelated to value. This stance provides a more coherent account for popular ambivalence toward abortion than does Dworkin's investment notion.

This Article will also briefly show that the German Constitutional Court decisions of 1975 and 1993 are based on this more adequate understanding of respect for life both before and after birth. This understanding may lead us not only to avoid a devaluation of postnatal human life, but also towards peace with honor in the abortion conflict, by seeking to protect prenatal life, not by punishing, but by empowering women. The German idea, at bottom, is that in a society in which pregnant women were truly free to choose, the overwhelming majority of women would choose life.³⁹ To require the law to aim at such a social result is to be at the same time pro-choice and pro-life.⁴⁰ Thus, even on the narrow issue of abortion itself, the counter-principles proposed in this Article are both more plausible in theory and more acceptable in result⁴¹ than are Dworkin's suggestions.

37. *Id.* at 87-88.

38. *Id.*

39. See Kommers, *supra* note 8, at 32.

40. See Richard Süth, *Protection Without Punishment: Finding Common Ground on Abortion*, CRESSET, Nov. 1992, at 5. As Dworkin points out, Catherine MacKinnon goes further to say that it is the inequality of women that dooms fetuses to a lesser right to life than they would otherwise have. *LIFE'S DOMINION*, *supra* note 1, at 55 (citing Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1316 (1991)). "In my opinion and in the experience of many pregnant women, the fetus is a human form of life. It is alive. But the existence of sex inequality in society requires that completed live birth mark the personhood line." MacKinnon, *supra*, at 1316. Mark Tushnet has also argued that in a less sexist world, a right to abortion might no longer make sense. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1365 (1984). If these people of the Left are correct, then the use of empowering, nonpenal means to limit abortion might be necessary only up to the point that women achieve real equality. In a truly egalitarian world, abortion might once again become fairly punishable because pregnancy would no longer be used as a weapon against women. For further discussion, see *infra* note 381 and accompanying text.

41. See Kommers, *supra* note 8, at 17. Donald Kommers notes that, after some initial controversy, "more and more Germans began to realize that the [1993] decision was a sensitive and nuanced attempt, undertaken with remarkable empathy and understanding, to balance the State's interest in protecting life with the woman's interest in self-determination." *Id.* Even in America, we might be able to follow this path to a solution to the abortion conflict, for it can be argued that the minimum fetal protection required by the 1993 German decision, 88 BVerfGE 203 (1993)—nonpenal State encouragement and support for birth over abortion—is also the maximum protection permitted by the 1992 American

I. THE AMBIVALENCE OF ABORTION ACCORDING TO DWORKIN

Dworkin contends that the battle over abortion cannot end as long as either side insists on speaking only the language of rights.⁴² A fetal right to life is flatly incompatible with a female right to abortion.⁴³

According to Dworkin, once each side comes off its high horse, both will agree that abortion is a wrong without being the violation of a right.⁴⁴ Most pro-choice people will admit that though a fetus does not possess a right to life correlated to a government duty of protection, it still has significant intrinsic value. Abortion destroys a human life.⁴⁵ As a result, "abortion is always a grave moral decision,"⁴⁶ and "never permissible for a trivial or frivolous reason."⁴⁷ Dworkin thinks that "sacred"⁴⁸ and "sanctity"⁴⁹ are good words to express the intrinsic fetal value acknowledged even by the pro-choice camp, but he insists that no theistic underpinning for these concepts need exist.⁵⁰ Therefore, he prefers to use the words "inviolable"⁵¹ or "inviolability"⁵² in connection with the fetus, for these have a more appropriately secular sound than do "sacred" and "sanctity."⁵³

To consolidate the foundation of his new and supposedly universally acceptable view, Dworkin needs to make the same claim about the pro-life camp—that it too considers the fetus to have only a sort of intrinsic value or inviolability rather than a full-fledged equal right to life. In addition, this value must be shown to be "detached" rather than "derived" from rights.⁵⁴ Dworkin makes strikingly strong assertions here. Although he claims only that "most"⁵⁵ pro-choice liberals agree that a fetus has inviolability, Dworkin argues that virtually no one on the pro-life side truly believes that the fetus has an equal

decision, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See *infra* note 388 (comparing the German and American decisions).

42. LIFE'S DOMINION, *supra* note 1, at 9-10.

43. *Id.*

44. *Id.* at 32-33.

45. *Id.* at 21-22.

46. *Id.* at 32.

47. *Id.* at 33.

48. *Id.* at 25.

49. *Id.* at 73.

50. *Id.* at 25.

51. *Id.*

52. *Id.* at 73.

53. *Id.* at 25.

54. *Id.* at 11.

55. *Id.* at 32.

human right to life.⁵⁶ It is unclear why he protests so much on this point, for his argument here is both weak and largely unnecessary to his final political position.

Dworkin is faced initially with much evidence that many people believe the fetus to have a right to life equal to that of the rest of us. For example, the 1975 German high court decision, analyzed by Dworkin,⁵⁷ asserts that with respect to the right to life, "no distinction can be made . . . between various stages of the life developing itself before birth, or between unborn and born life."⁵⁸ Nuanced polling data also seem to show that at least a substantial plurality of Americans believes in the equal dignity of the unborn. A 1991 Gallup poll cited by Dworkin found that 36.8% agreed that "'Abortion is just as bad as killing a person who has already been born, it is murder.'"⁵⁹ If the only other polling option had been something like "Abortion is good," one might easily question whether the above respondents really meant what they said.⁶⁰ The poll at issue, however, contained two other ways to express misgivings about abortion: "'Abortion is murder, but it is not as bad as killing someone who has already been born,'" which got 11.5%, and "'Abortion is not murder, but it does involve the taking of human life,'" which received 28.3%.⁶¹ To my mind, these data show that 11.5% plus 28.3%—including many who might style themselves pro-life—could well agree with Dworkin's inviolability-but-no-equal-rights view of the fetus, making his a politically significant, though often overlooked, perspective. Dworkin is not satisfied with such a conclusion, however. He wants to claim that even those in the 36.8% plurality do not really believe in equal rights for the unborn.⁶²

Though its content varies, the basic form of Dworkin's critique is the following: Although pro-lifer X may say that she⁶³ believes in an equal right to life for the fetus, X also believes that the government should leave some abortions, especially in early pregnancy, unpun-

56. *Id.* at 95.

57. *Id.* at 64.

58. Jonas & Gorby, *supra* note 9, at 638.

59. *LIFE'S DOMINION*, *supra* note 1, at 13.

60. For example, one might raise this question with regard to a 1986 *New York Times* poll with fewer available options that came up with 55% of respondents, including 61% of women, who agreed that "'abortion is the same thing as murdering a child.'" Adam Clymer, *One Issue That Seems to Defy a Yes or No*, N.Y. TIMES, Feb. 23, 1986, § 4, at 22.

61. *LIFE'S DOMINION*, *supra* note 1, at 13.

62. *Id.* at 94 (claiming that if very conservative people really believed in fetal rights, they would not permit abortion even to save a mother's life).

63. In *Life's Dominion*, Dworkin uses traditionally inclusive masculine pronouns, except when referring specifically to women.

ished. X's second belief is inconsistent with X's first belief. Therefore, X does not really hold the first belief, no matter what she says.⁶⁴

Some problems with this argument are empirical. Dworkin's data about anti-abortionists are often little more than surmises and may well be inaccurate. For example, he frequently states that even pro-lifers consider early abortion to be not so bad as late abortion,⁶⁵ and, therefore, they clearly fail to recognize an equal right to life at all stages of pregnancy.⁶⁶ He offers no proof of that assertion, however. To my knowledge, permissiveness with regard to early abortion is a rarity among anti-abortionists.⁶⁷ Certainly, it has never been the position of the National Right to Life Committee.⁶⁸ Likewise, Dworkin argues that the Roman Catholic Church only recently began using the

64. *Id.* at 14, 31, 32, 34, 64, 94.

65. *Id.* at 32-33, 88-89, 93-94.

66. *Id.*

67. For example, see the words of the anti-abortion 1975 German decision, quoted *supra* at note 58, refusing to recognize any distinction between early and late abortion with regard to the right to life. See Jonas & Gorby, *supra* note 9, at 638. The 1993 opinion reaffirms this same equality. See Judgment of 28 May 1993, 88 BVerfGE 203, 243-44, 247-48 (1993), 1993 EuGRZ 229, 240-41. In addition, *Roe v. Wade*, 410 U.S. 113 (1973), does not make much distinction between early and late abortion. *Roe* granted an almost unlimited right to third-trimester abortion. *Id.* at 164-65. Even just before birth, destruction of the fetus must be permitted if it promotes maternal "health." *Id.* at 165. By referring to its companion case, *Doe v. Bolton*, 410 U.S. 179, 192 (1973), *Roe* defines health broadly to include all factors—even psychological and familial—relevant to well-being. *Roe*, 410 U.S. at 151. It is clearly unconstitutional for a state to forbid intentionally killing a viable fetus, if "the unborn child's survival" would have a "potential psychological or emotional impact on the mother." *Thornburgh v. American College of Obstetricians & Gynecologists*, 737 F.2d 283, 299 (3d Cir. 1984).

Since 1973, every politically significant attempt to limit *Roe* late in pregnancy has been led by those who view such a prohibition as a first step toward forbidding early abortion. See Ellen Goodman, Editorial, *Partial-Truth Attacks to Dominate Rhetoric Surrounding Abortion*, ARIZ. REPUBLIC, Oct. 7, 1996, at 35 (arguing that criminalizing late-term procedures will open the door to efforts to criminalize other procedures). But see *Leavitt v. Jane L.*, 116 S. Ct. 2068, 2073 (1996) (per curiam) (reversing, on procedural grounds, a Tenth Circuit holding that Utah statute regulating abortions after 20 weeks of gestational age was unconstitutional).

Dworkin may have missed all of this because he misread *Roe v. Wade*. He mistakenly asserts that under *Roe* the government "may outlaw abortion altogether when the fetus has become a viable being, that is, in the third trimester of pregnancy." LIFE'S DOMINION, *supra* note 1, at 168; see also *id.* at 63, 114-15 ("Fetuses have no interests before approximately the point in pregnancy after which they are viable, and *Roe v. Wade* permits states to forbid abortion after that point, anyway."). Dworkin, without explanation, later contradicts himself and admits that even a third-trimester prohibition would be "subject to certain exceptions" (which is still a misleading understatement of *Roe*'s and *Doe*'s wide permission for late abortion). *Id.* at 170.

68. Telephone Interview with Burke Balch, Director of Medical Ethics for the National Right to Life Committee (Nov. 11, 1995).

"right" of the fetus as a reason against abortion,⁶⁹ without mentioning that our modern rhetoric of rights came into existence only in the late Middle Ages⁷⁰ and into the Roman Catholic Church still later.⁷¹ The Church could hardly have been expected to speak of the rights of the fetus before it spoke of the rights of anyone else.⁷²

Likewise, Dworkin's charge of inconsistency is not obviously true. Many scholars, both pro-life and pro-choice, have argued that even if the fetus has a dignity equal to that of the rest of us, it does not necessarily follow that abortion should be punished in hardship cases (such

69. LIFE'S DOMINION, *supra* note 1, at 39.

70. The idea that legal duties must correspond to legal rights is both culture and time-bound, perhaps arising in the West only in late medieval nominalism. Professor Michel Villey has defended the thesis that William of Ockham was among the first fully to conceptualize rights over property. See MICHEL VILLEY, *SEIZE ESSAIS DE PHILOSOPHIE DU DROIT* 140 (1969). Ockham did so, according to Villey, in order to permit the Franciscans to renounce such rights and thus more easily to fulfill their radical vows of poverty. See *id.* At the same time as they renounced civil claims to property, they could continue to administer and use it in a physical sense. See *id.* Among the best, albeit short, histories of the modern idea of rights are those by John Finnis and Martin P. Golding. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 205-10 (1980); Martin P. Golding, *The Concept of Rights: A Historical Sketch*, in *BIOETHICS AND HUMAN RIGHTS* 44-50 (Elsie L. Bandman & Bertram Bandman eds., 1978); see also Martin P. Golding, *Justice and Rights: A Study in Relationship*, in *JUSTICE AND HEALTH CARE* 23-35 (Earl E. Shelp ed., 1981) (for a more refined treatment). Ernest Fortin summarizes the matter well with regard to nonpositive rights:

Nowhere in the older tradition does one run across anything like a theory of natural rights The passage from natural law to . . . "human" rights represents . . . the paradigm shift in our understanding of justice and moral phenomena generally. Prior to that time, the emphasis was on virtue and duty, that is to say, on what human beings owe to other human beings or to society at large, rather than on what they can claim for themselves.

Ernest L. Fortin, *The Natural Wrong in Natural Rights*, *CRISIS*, May 1994, at 20, 20.

71. George Weigel has written of the "rights revolution" in the Roman Catholic Church. See George S. Weigel, *Catholicism and Democracy: The Other Twentieth Century Revolution*, 12 *WASH. Q.* 3 (1989); George S. Weigel, *John Courtney Murray and the Catholic Human Rights Revolution*, *THIS WORLD*, Fall 1986, at 14; George Weigel, *A Sphere of Freedom Inside Every Human Being*, *BALT. SUN*, Sept. 29, 1995, at 15a, available in 1995 WL 2466277.

72. An unsupported factual claim less significant for his argument is Dworkin's assertion that Operation Rescue uses "violence to intimidate women entering abortion clinics." LIFE'S DOMINION, *supra* note 1, at 176. Although it is easy to imagine anti-abortion violence against physicians and clinic staff—and there is no doubt that this has occurred—any implication that anti-abortionists would use violence against pregnant women would seem bizarre because it could induce miscarriage. Furthermore, Flip Benham, Operation Rescue National Director, stated recently: "In rescue events across the nation, for several years now, in which nearly 80,000 of our people have been arrested, not one has been convicted of a violent offense." John G. Gill, *Summer of Justice Rescue Rocks Little Rock*, *LIFE ADVOC.*, Aug. 1994, at 18, 19. Bill Dedman quotes the required Operation Rescue pledge: "I commit to be peaceful, prayerful, and nonviolent in both word and deed." Bill Dedman, *Both Sides from the Inside*, 18 *MOTHER JONES* 28, 31 (1993). He indicates that during an entire week of protests, he saw only one angry anti-abortion face. See *id.* at 32. Overall, the pro-lifers looked "prayerful, peaceful, committed." *Id.* at 68. Dworkin offers no counterevidence whatsoever regarding Operation Rescue.

as when the life of the mother is itself threatened or when the pregnancy is due to rape) or even punished at all.⁷³ The reasons for nonpunishment could be that the abortions in question are justified by an individualistic morality of self-preference, that they are excused by human frailty, or simply that they are unwise to prohibit if the prohibition is likely to be ineffective.⁷⁴

Even if Dworkin were correct that there is no way consistently to hold both to fetal equality and to nonpunishment for some abortions, he would by no means have proven that people do not in fact hold both of these views. Even reasonable people are quite capable of applying a general principle (here the equal right to life of all human beings, born or unborn) inconsistently in a particular situation (in the case of rape, for example) without ceasing to hold that principle. At best, we could say of such people that we do not know what their "real" position is, if by this we mean the position they would choose if they were convinced by Dworkin that they had to choose one or the other. Perhaps we should even assume they would abandon the exception rather than give up the principle. Dworkin himself, in matters ranging from constitutional interpretation to understanding a mother's moral desires,⁷⁵ maintains that respecting the opinions of others means assuming that they would not knowingly wish to depart from their principles, that they would wish those principles to trump

73. On the pro-choice side, see the classic articles arguing that even if the fetus is a person, abortion should sometimes be viewed merely as a nonculpable failure to be a Good Samaritan. See Donald Regan, *Reuniting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). Both articles are cited by Dworkin. LIFE'S DOMINION, *supra* note 1, at 110-11, 249 n.4. Most recently, in a response to *Life's Dominion*, Frances Kamm has made the same sort of argument. See Kamm, *supra* note 11, at 191 ("Need alone does not confer a right to have aid begin, nor a duty to give it."). Dworkin himself makes the astonishing positivist claim that believing an act to be the killing of a person may be "no reason" to prohibit it. LIFE'S DOMINION, *supra* note 1, at 22. He says that we could consistently "believe philosophically that pigs are persons but that human beings have no reason to treat them as we treat one another." *Id.*

On the pro-life side, Gerard Bradley suggests that people might wish not to condemn all abortions as culpable homicides even if the fetus were recognized as a constitutional person with rights equal to those of the rest of us. See Bradley, *supra* note 11, at 345. He cites common notions of justification and excuse in the face of danger to one's own life, as well as the flexibility granted to state penal law in the implementation of the Fourteenth Amendment. See *id.* at 344-46. Concerns about enforceability and the need for political compromise could lead even someone who believed in equal rights for the unborn to acquiesce in noncriminalization of some abortions. See *id.* at 344-47, 380-85.

74. The German Constitutional Court decisions, see *supra* note 9 and *infra* notes 372, 382 and accompanying text, open the further possibility that the nonpunishment of abortion could actually be helpful in providing greater protection for unborn life.

75. LIFE'S DOMINION, *supra* note 1, at 133-42.

inconsistent exceptions.⁷⁶ If Dworkin applied his own maxims to his interpretation of pro-life opinion, he would find much (though not all) of that opinion strongly anchored in a sincere belief in the equal right to life of unborn children.

Dworkin offers a second argument to the effect that unborn fetuses do not have an equal right to life.⁷⁷ This argument is stronger and more substantive. Dworkin contends that nothing can have a right that does not have interests,⁷⁸ and nothing can have an interest that does not have consciousness.⁷⁹ Therefore, he concludes, because fetuses (at least in the early stages of pregnancy) do not have consciousness, they can possess neither interests nor rights.⁸⁰

Once again, however, it is not clear why Dworkin thinks he is universally convincing here, nor why he thinks he has to be.⁸¹ As to the question of whether there can be rights without interests, Dworkin's view would seem to mean that the ascetic traditions of many religions are destructive of human rights. Those traditions, of course, attempt to purge the self of all interest in its own life or well-being. One of my favorite stories, perhaps apocryphal, is that of the Tibetan monk confronted by a Chinese captain of an invading army squad. The Chinese captain is reported to have said to him, "Do you realize that I am someone who can have you shot without blinking an eye?" The monk is reported to have responded, "Do you realize that I am someone who can be shot without blinking an eye?" According to Dworkin, would the monk's relative lack of interest in remaining alive mean that he had less right to live than more self-interested people would have? What about others who, because of sickness or bad luck, profess indifference to continued existence? Would they have weaker rights?

Even more problematic is Dworkin's claim that an entity cannot have interests, and thus cannot have rights, if that entity does not have consciousness.⁸² Do people's rights become attenuated as they tire and fall asleep each night? On an intuitive level, it seems insufficient for Dworkin simply to assert that "it is not against the interests of a baby carrot that it be picked early and brought to the table as a deli-

76. *Id.*

77. *Id.* at 16-20.

78. *Id.* at 19-20.

79. *Id.* at 15-20.

80. *Id.* at 15-17.

81. Judith Jarvis Thomson, for example, remains unconvinced by Dworkin on this point—saying that the idea that a fertilized human ovum has a right to life makes "perfectly good sense" to her—and yet she still comes out squarely in favor of elective abortion. Judith Jarvis Thomson, *Abortion: Whose Right?*, BOSTON REV., Summer 1995, at 13.

82. LIFE'S DOMINION, *supra* note 1, at 15-20.

cacy.”⁸³ He is also not obviously correct when he makes the claim that a caterpillar has no interest in becoming a butterfly.⁸⁴ Could not these examples be used equally well to demonstrate that interests without consciousness are indeed quite possible? Would it not be wrong wantonly to kill plants or insects, despite their alleged lack of consciousness?

Perhaps we hesitate to agree with Dworkin because we suspect that carrots and caterpillars may in fact possess a primitive form of consciousness. Dworkin seems to subscribe to a form of dualism in his sharp division of living entities between those that have consciousness and those that do not, rather than recognizing a gradual shading from human awareness to the deafness of stones. Carrots and caterpillars do respond to their environments.⁸⁵ How can we say that this is not, to use Dworkin’s words, “some form of consciousness”?⁸⁶

Dworkin may mean to suggest that *self-consciousness* is what is required as a foundation for interests, although that could mean postponing rights to some time substantially after birth, if Dworkin also insists on an elaborate sort of “self.” If by self-consciousness we mean, however, only reflexivity—an awareness of one’s own being as well as of one’s environment—then a kind of self-consciousness is present wherever life is present. In any organism there are processes of homeostasis and homeorrhexis occurring, in which the organism monitors its own well-being and development. This is feedback, conscience, with-knowledge. In Dworkin’s language, the developing carrot and the metamorphosizing caterpillar do take an “interest” in themselves; if internal or external forces harm their development, corrective mechanisms are applied to heal the injury and reestablish proper growth. Life must be conscious of itself in order to govern itself, in order to exist as a unified being. The zygote and embryo, like the carrot and caterpillar, have “some form of” consciousness and even of

83. *Id.* at 16.

84. *Id.*

85. See JOSEF PIEPER, *The Philosophical Act*, in LEISURE: THE BASIS OF CULTURE 83-84 (Alexander Dru trans., 1963).

Every living thing lives in a world, in “its” world, and “has” a world in which it lives. . . . [T]he relation between a plant and the nutriment [sic] it draws through its roots out of the ground . . . is a real relation in the primary sense of the word, in the active reflexive sense of “relating itself”: the nourishment in the ground and in the air is absorbed and assimilated into the sphere of the plant’s life by the dynamic centre of the plant, and its power of establishing relations. All that constitutes the plant’s range of relations makes its world. A plant, in fact, has a world, and a stone has not.

Id.

86. LIFE’S DOMINION, *supra* note 1, at 16.

self-consciousness, and thus would seem to have the foundation Dworkin requires for the ascription of a right to life.

Still, I must agree with Dworkin that it seems odd to talk about fetuses having interests or about us needing to be fair to those interests.⁸⁷ I think, however, the language of interests and rights equally odd in speaking of newborn infants or of others who are not as fully conscious or as fully self-centered as are we. The calculation of interests is most at home in mercantile contract talk. Rights and fairness are the language of bargaining among self-interested adults. It is strange to speak of newborn infants or caterpillars having interests, or getting their fair share, for such entities do not bargain at arm's length with the rest of us. Their consciousnesses have not yet risen (or fallen, depending on one's viewpoint) to the point where they regard others as competitors. It is very difficult to squeeze the unborn into the image of a set of calculating adults, bargaining out a social contract of basic rights.⁸⁸ Yet why should we regard social contract thinking, with its trappings of interests, reciprocity, and consent, as the only or highest form of normative political and legal discourse?

The language of rights seems to be itself a product of modern individualism. As suggested above, the ancient religious and secular worlds had no clear concept of a right in our modern sense of a power possessed by an individual.⁸⁹ To them, right meant what was appropriate or lawful, or it meant simply the law itself. The notion that one could possess a right would have made as little grammatical sense as to say today that one can possess the law. In a sense, when we talk today of people having natural or positive rights, we distribute the law like a commodity. We apportion it among ourselves. We reduce the law from a public authority to be obeyed to a set of private security guards

87. *Id.* at 18, 22.

88. John Rawls solved this problem by treating all those potentially able to bargain as though they were actual bargaining partners, thus including infants explicitly and fetuses by implication:

[T]he minimal requirements defining moral personality refer to a capacity and not to the realization of it. *A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice.* Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation . . . seems necessary to match our considered judgments. Moreover, regarding the potentiality as sufficient accords . . . with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies.

JOHN RAWLS, *A THEORY OF JUSTICE* 509 (1971) (emphasis added). For further discussion of the role of potentiality in discussions of abortion, see *infra* notes 109-135 and accompanying text. Without explanation, Rawls nevertheless, in a recent footnote, declared his support for elective abortion. See JOHN RAWLS, *POLITICAL LIBERALISM* 243 n.32 (1993).

89. See *supra* note 70 and accompanying text.

to be commanded. Whereas ancient law was an object of common loyalty, modern rights divide up the human community into a set of petty fiefdoms, each governed by a sovereign who has sway over all who enter her domain.⁹⁰

If we are to preserve a sense of solidarity, the language of rights and interests described above is not the best way to conceive the human community.⁹¹ To this extent, I agree with Dworkin that it is better not to think of fetuses as having rights.⁹² A fetus with rights is a competitor, or even a potential enemy. Why must we think of unborn children this way? Could we not see the fetus instead as a being who elicits in many people a sense at least of inviolability, if not of care and concern?⁹³ Would that we could move away from rights talk, not only with regard to abortion, but with regard to many other problems we face in the human community.⁹⁴

Moreover, the language of rights and of rights-holders, whom we call persons, may be particularly unsuitable to a resolution of debates

90. See Richard Stith, *Generosity: A Duty Without a Right*, 25 J. VALUE INQUIRY 203, 210 (1991). The Latin term "jus" originally meant "law" and was closely related to "justice." Only much later did it also come to mean a "right" possessible by individuals.

91. The literature contains further critiques of rights along these lines. See, e.g., THEODORE M. BENDITT, *RIGHTS* (1982) (exploring rights and rights theories); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 47-108 (1991) (arguing an overreliance on rights in the American consciousness); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (providing an overview of the relationship of justice and morality to individualism and claims of community); P.S. Elder, *Legal Rights for Nature—The Wrong Answer to the Right(s) Question*, 22 OSOODE HALL L.J. 285-86 (1984) (surveying the possible range of legal rights for nature from shallow to deep ecology); Karl Marx, *On the Jewish Question*, in *EARLY WRITINGS* 211, 230-31 (Rodney Livingston & Gregor Benton trans., 1975) (discussing security obtained through political association as a means of preserving rights and property); Jan G. Narveson, *Commentary*, 4 J. VALUE INQUIRY 258 (1970) (critiquing the failure of Feinberg's theory of rights to address the principle of utility); Joseph Raz, *Rights-Based Moralities*, in *UTILITY AND RIGHTS* 42-59 (R.G. Frey ed., 1984) (arguing that morality should not be viewed as right-based); Charles Taylor, *Atomism*, in *POWERS POSSESSIONS AND FREEDOM: ESSAYS IN HONOUR OF C.B. MACPHERSON* 39-61 (Alkis Kontos ed., 1979) (defining political atomism and providing historical overview of its evolution).

92. *LIFE'S DOMINION*, *supra* note 1, at 9-10.

93. If you and I recognize someone's rights, we are not bound by love to him or her, nor do we feel between ourselves a bond of fellowship. By contrast, if we jointly commit ourselves to caring for another, the basis is laid both for affection for the object of our concern and for community among ourselves. This attitude is much closer to the actual feelings of parents for very young children than are the official rights-based positions of pro-lifers or pro-choicers in the United States. Parents feel infants neither to be their private property nor to be individuals negotiating their rights at arm's length. Instead, and for many years, a baby is the shared source of a common life.

94. Useful attempts have been made to rescue the concept of rights from self-centered individualism. See FINNIS, *supra* note 70, at 198-226; ROBERT P. GEORGE, *MAKING MEN MORAL* 92-112 (1993); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 36-42 (1986).

like that over abortion. Rights split the world into subjects and objects, persons and property, consumers and consumed. All entities other than persons dissolve into an amorphous stockpile⁹⁵ of resources, to be divided fairly among the rights-holders.⁹⁶ Trees, whales, and fetuses must either become legally recognized persons or else lose all principled protection. Such an all-or-nothing stance cannot but hobble debate on abortion, driving both sides to extremes because only the extremes can be conceptualized in our law. Whether or not Dworkin proves ultimately correct, his turn away from rights is clearly a step toward renewed dialogue and community.

Finally, there is an important methodological reason to bracket the idea of rights, to refuse (at least initially) to answer the question of whether fetuses have rights: Dworkin invites us honestly to examine our deepest and simplest intuitions regarding human dignity before and after birth. An adequate response must discard not only all political and moral agendas, but also the conceptual structures developed by political and moral theory. In seeking to be as purely descriptive as possible, we must eschew the complex and controverted notion of a right. Whatever merit that concept may have, it is not a root perception but a theoretical construct. Because this Article will attempt a phenomenological description of the world we share,⁹⁷ it should not begin with a search for rights.

Thus, any quarrel I might have with Dworkin here would not be over his failure to acknowledge rights in fetuses. It would be, rather, over his insistence on emphasizing individual rights for the rest of us, and over any claim that those with rights must dominate other beings who have only what he calls inviolability. The fact that the unborn, along with infants and other human and nonhuman entities, cannot

95. This notion of stockpile is an attempt to translate Heidegger's idea of *Bestand*. See MARTIN HEIDEGGER, *DIE TECHNIK UND DIE KEHRE* 16 (1962). See also Pieper's suggestion that theory as such disappears once the world becomes "raw material for human activity." PIEPER, *supra* note 85, at 81. I have argued that rights thinking tends to reduce the world to the status of an aspirin tablet. An aspirin tablet is of interest to me not because it is good, but only because it makes me *feel* good. Our world becomes a great stockpile of actual or potential tablets, capable eventually (we hope) of producing every enjoyable experience we might ever wish. What else *could* we do with such a world except exploit it? See Richard Stith, *Thinking About Ecology: Resource Management, Recognition of Rights, and Phenomenological Truth*, *THE CRESSET*, Nov. 1981, at 7-8; see also Richard Stith, *The World As Reality, As Resource, and As Pretense*, 20 AM. J. JURIS. 141 (1975) (discussing man's view of the world as resource as arising from self-interest).

96. See Stith, *Critique of Fairness*, *supra* note 21, at 471-72.

97. See HERBERT SPIEGELBERG, *II THE PHENOMENOLOGICAL MOVEMENT* 655, 690 (1960).

bargain and reciprocate need not mean that they have less intrinsic dignity than those who can.⁹⁸

To sum up: Even though Dworkin is mistaken in thinking that almost all pro-lifers regard the fetus only as an inviolable thing, rather than as a part of the human community,⁹⁹ he is correct in pointing out that many of them ought to be able to speak comfortably of the fetus without using the language of rights.¹⁰⁰ A solution to the abortion question based on the inviolability of life, rather than on rights, is thus potentially viable, at least as a compromise. Although Dworkin is wrong in holding that the fetus does not have consciousness sufficient to legitimate speaking of its interests,¹⁰¹ he may be right politically in his suggestion that we avoid the language of rights when it comes to the unborn.¹⁰² Speaking of rights creates a sense of conflict, or at least of competition, in an already highly polarized political dispute. By talking instead about inviolability and the common good, we may more easily find a way to restore peace in the abortion war.

Having established to his satisfaction that most people on both sides of the abortion dispute recognize an intrinsic value, an inviolability, in human life prior to birth, but that this inviolability is not and cannot be equivalent to a right to life, Dworkin proceeds to ask what else it could be.¹⁰³ In setting out the problem here, Dworkin is at his strongest. He points out that the intrinsic value of human life cannot be the same kind of intrinsic value we usually find elsewhere in the world.¹⁰⁴ Ordinarily, when we think something of intrinsic value, we want to have as much of it as possible, or at least its value *in potentia* correlates with its actualized value. The intrinsic value of knowledge, for example, means that we want to have more of it, not just to preserve what we have.¹⁰⁵ It would be odd for someone highly to value the diamonds in her possession, but at the same time not to care in the slightest about, or even to be opposed to, acquiring more

98. On a metatheoretical level, it seems odd for Dworkin to ascribe the highest value to entities with the most extensive consciousness. After all, Dworkin opposes the subjectivity of value. *LIFE'S DOMINION*, *supra* note 1, at 67. Why then does he treat as obvious the prime value of subjectivity? *Id.* at 73. There is at least a tension, if not a contradiction, between Dworkin's commitment to the objectivity of value and his exaltation of subjectivity.

99. *Id.* at 15-21, 91-97.

100. *Id.*

101. *Id.* at 16-19.

102. *Id.* at 9-11.

103. *Id.* at 68-81.

104. *Id.*

105. *Id.* at 73.

diamonds.¹⁰⁶ This strange stance, however, is just what we often take with regard to human life. Few of us think of human life as so valuable that we ought individually or collectively to have an indefinite number of children. Yet most of us agree, according to Dworkin, that once human life exists, and even before it acquires rights, it is to some degree wrong to destroy it.¹⁰⁷ It would not be uncommon or strange for a parent to be strongly opposed to having more children, for financial or other reasons, and yet to value a child quite highly before and after birth if conception were accidentally to occur. Without reverting to rights discourse—in which the distinction is obvious—how can we make sense of this strange stance? How can something have inviolable value once it exists, without its possibility having a correlatively high value?

Dworkin helps our reflections by pointing out other areas in which we seem to take the same sort of bifurcated stance of wanting to respect and protect things once they exist, and yet of being indifferent or even hostile to their coming into existence in the first place. He suggests that we feel a kind of reverence for art:

We attach great value to works of art once they exist, even though we care less about whether more of them are produced. . . . I do not myself wish that there were more paintings by Tintoretto than there are. But I would nevertheless be appalled by the deliberate destruction of even one of those he did paint.¹⁰⁸

Similarly, Dworkin argues that the same people who want to protect at least the major species of life that have developed over the eons may have hardly any interest in bringing new species into existence.¹⁰⁹ We revere or respect, treat as inviolable, the species that have developed up till now, providing legal protection for them at significant cost to human enjoyment, yet we do not encourage science to spend its time developing other, perhaps even more curious, forms of life.

In all three cases—new human life, art, and nonhuman species—our attitude is that of respecting and protecting those entities that already exist, considering them to have great value, without wishing at the same time to bring other such highly valued entities into existence. What quality could they possess that could account for our unusual attitude toward them? This is the great puzzle that Dworkin seeks

106. This example is not used by Dworkin.

107. *LIFE'S DOMINION*, *supra* note 1, at 68-69.

108. *Id.* at 74.

109. *Id.* at 75.

to solve. He has stated it well, but unfortunately his solution is defective.

II. DWORKIN'S INVESTMENT-BASED THEORY OF INVIOABILITY

Dworkin's explanation of our seeming split personality is both simple and elegant. A possible entity can have little or no value while that same entity once actualized can have great value if the source of the latter's value is something *added* as it is created and developed.¹¹⁰ With regard to abortion (and, as we shall see, euthanasia), Dworkin defends what he calls "a particular understanding of the sanctity of life: that once a human life has begun, it is a waste . . . when the investment in that life is wasted."¹¹¹ We think abortion a shame because we regret the waste of the natural and human investment¹¹² that has been made in the fetus.¹¹³ Yet we are not saddened when no new fetuses are conceived, when couples use abstinence or contraception, because in this case no investment in life is wasted.

Although Dworkin claims to be explaining the "intrinsic" value¹¹⁴ of human life, it is clear that his solution to our puzzle relies on an extrinsic value, the value of the creative "effort"¹¹⁵ invested in the fetus. Dworkin's explanation of the paradox that we desire to protect works of art and animal species more than we desire to produce them is similar: "[T]he nerve of the sacred lies in the value we attach to a process or enterprise or project rather than to its results"¹¹⁶ If we do not wish that process or effort to be wasted, we will want both to protect it once it has been invested and not to invest it unwisely in the first place. Dworkin's theory shows how we can be opposed to casual abortion for the very same reason that we can be opposed to casual conception—because we do not wish creative effort to go to waste.

Dworkin uses this investment theory to explain our feelings toward human life after as well as before birth.¹¹⁷ The longer a child has been alive, the more effort invested in her, the more regrettable it is if she dies prematurely. On the other hand, if the investment in someone's life has largely paid off (as with the elderly¹¹⁸) or is des-

110. *Id.* at 74-75.

111. *Id.* at 213.

112. *Id.* at 214.

113. *Id.* at 73, 213.

114. *Id.* at 60, 69.

115. *Id.* at 79, 81-84.

116. *Id.* at 78.

117. *Id.* at 82-85, 213-14.

118. *Id.* at 85.

tined to be frustrated in any event (as with the severely disabled¹¹⁹), then death is not so tragic.¹²⁰ Human life, for Dworkin, is normally most inviolable from early adolescence to early middle age—because people within this range embody great investment and also, if healthy, great promise.¹²¹

As an example of how abortion can actually manifest respect for life's inherent value, Dworkin mentions the pregnant teenager who may find a greater investment in her own life wasted if she does not, by abortion, waste a lesser investment she and others may have made in her unborn child.¹²² Paradoxically, the inviolability of life may well require the destruction of life, according to Dworkin.

Nothing thus far in Dworkin's arguments is based upon religion. Indeed, Dworkin emphasizes that one of his "main claims throughout this book . . . [is] that there is a secular . . . interpretation of the idea that human life is sacred."¹²³ Dworkin points out that art and animal species may likewise be perceived to be sacred in a secular sense, and so the state may quite properly protect the "intrinsic value" found in them:

Neither cultural achievements nor animal species nor future human beings are creatures with rights or interests. But no one doubts that government may treat art and culture as having intrinsic value, or that government may act to protect the environment, endangered animal species, and the quality of life of future generations. Government may properly levy taxes that will be used to support museums, for example; it can forbid people to destroy their own buildings if it deems these to be of historical architectural value; it can prohibit manufacturing practices that threaten endangered species or injure future generations. Why should government not have the power to enforce a much more passionate conviction—that abortion is a desecration of the inherent value that attaches to every human life?¹²⁴

Having labored to convince us that "sanctity" and the "sacred" can have purely secular meanings, Dworkin insists that beliefs regarding one subset of the sacred—human life—must nevertheless be denominated "religious," even when held by nontheists, because these

119. *Id.* at 98.

120. *Id.* at 85, 98-99.

121. *Id.* at 87; *see also id.* at 84-101 (discussing liberal and conservative variations on the "frustration" that accompanies a wasted life).

122. *Id.* at 99.

123. *Id.* at 195.

124. *Id.* at 149.

beliefs are "more fundamental" to our moral personalities.¹²⁵ Given that these "religious" beliefs will conflict (according to the different values attached to divine, natural, and human investment), governments may not gravely damage some people by forcing them to conform to a version of life's sanctity that they do not share.¹²⁶ Although we may agree that prenatal life, like art and animal species, has some inherent value because of the creative investment it embodies,

[a] state may not curtail liberty, in order to protect an intrinsic value, when the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people's opinions about the nature of that value reflect essentially religious convictions that are fundamental to moral personality.¹²⁷

125. *Id.* at 154-56.

126. *Id.* at 154-55.

127. *Id.* at 157. Dworkin thinks these criteria preserve the right of the state to protect art and animal species. *Id.* at 154. He concedes, however, that protecting endangered animal species could be unconstitutional if it were as damaging to particular people as he claims childbirth "may" be to women. *Id.* Dworkin argues that an anti-abortion law's harm to some makes it unconstitutional even as to those who are not harmed. *Id.* at 153. We can easily imagine that a ban on whaling, for example, could endanger the way of life of an Eskimo tribe, or a prohibition of a dam could entail grave hardship for certain farmers. Less physically, but perhaps more profoundly, strong protection for nonhuman species could offend many people's sense of their unique human dignity, and thus take away much of their own self-respect. If many are thus harmed, is species protection unconstitutional, as with abortion?

We are likewise seriously divided about what the value of nonhuman life means. Dworkin's pro-species approach, *see generally id.* at 75-81, is merely one of a number of contemporary versions of respect for animal life. Dworkin may wish rules to protect the existence of species, while animal rights activists want to protect each individual animal. That these two views may come into conflict is obvious with regard to practices such as the culling of deer populations by permitting hunting during a certain season of the year. Such weeding out could be beneficial to a species (deer or other) and yet be incompatible with the notion of individual rights possessed by the deer that are killed. Thus, some may hold the intrinsic value of animal life to require hunting while others hold it to forbid hunting. In addition to these two views—the sanctity of species and the sanctity of each animal—there are other perspectives that would be even less particularistic than that of Dworkin. Those who wish to preserve the wilderness are concerned neither with protecting the lives of individual animals nor with preserving individual species but, rather, with preventing human disruption of nature. If a species were en route to disappearance through the natural progression of an ecosystem, this third point of view would find no fault, while the first might urge human intervention to defend the waning species and the second might demand intervention to protect endangered individuals. In other words, the inviolability of nonhuman life not only includes whatever ambiguities Dworkin may find in the idea of the inviolability of the individual human, *id.* at 71-84, but also includes additional, radically different value perspectives. Protection of the nonhuman environment is thus potentially far more controversial and divisive than protection of individual humans. Is it, therefore, also unconstitutional?

Dworkin leaves largely unexplained why the state may not punish at least those abortions performed for trivial reasons—because by definition these abortions involve little hardship and Dworkin thinks there exists a near-universal consensus that they are wrong. Yet he goes further. Not only may government not prohibit any abortions, but contrary to the current position of the United States Supreme Court,¹²⁸ it may not even support “one side of an argument about an essentially religious issue”¹²⁹ by denying funding for elective abortion while paying for childbirth,¹³⁰ for this “is tantamount to establishing one interpretation of the sanctity of life as the official creed of the community.”¹³¹ For the same sort of reasons, the government should “not impose some uniform, general view” with regard to protecting the lives of the aged and disabled.¹³² All the state may do in supporting the inviolability of human life—as opposed to enforcing legal and constitutional rights—is to promote reflective decisionmaking. Governments may “encourage their citizens to treat the question of abortion seriously,”¹³³ but may not seek to teach a right answer.

It is also unclear that views regarding abortion are more religious than views regarding animal species. Dworkin indicates that the view that the human race should survive “is not a matter of justice at all but of our instinctive sense that . . . human survival is of sacred importance.” *Id.* at 78. Likewise, notions that the earth should survive or that life in general should survive are matters of intrinsic value that count as religious beliefs, according to the tests Dworkin advocates above. Must the state, therefore, remain neutral with regard to such values?

Finally, concern about other species may be at least as fundamental to moral personality as are views regarding abortion. Protection for nonhuman life may require a more ascetic lifestyle, from not swatting rare flies to not wasting paper and other products of trees. More deeply, concern for nonhuman life may involve a rejection of growth and progress as fundamental direction-giving, meaning-giving values in favor of a way of life built on stasis. The language used in the 1992 *Planned Parenthood v. Casey* decision, which Dworkin quotes with approval, *id.* at 171 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (1992) (plurality opinion)), is at least as appropriate here as with regard to abortion. The *Casey* plurality spoke of “reverence for the wonder of creation,” not just for individual human entities. *Casey*, 505 U.S. at 853. That decision also spoke of the heart of liberty being “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 851. For centuries, creation and the universe have been thought of as subject to man’s dominion, or at least to his stewardship. According other species equal dignity (or even inferior but substantial dignity) will radically change the way we live and the way we conceive our place in the world. Thus, it is difficult to see how someone who adopts Dworkin’s view as to why elective abortion is constitutionally protected can avoid agreeing that those whose behavior is destructive of animal species may also merit constitutional protection.

128. See *supra* note 32 (discussing Supreme Court cases regarding abortion issues).

129. *LIFE’S DOMINION*, *supra* note 1, at 162.

130. *Id.* at 174-75.

131. *Id.* at 175.

132. *Id.* at 212-13.

133. *Id.* at 153.

Dworkin begins with the pro-life thesis that abortion destroys an inviolable human life, but he ends with a pro-choice position even stronger than that of *Roe v. Wade*¹³⁴ and its progeny.¹³⁵

III. UNFORTUNATE CONSEQUENCES OF VALUING INVESTMENT

Dworkin's most legally significant contention is that life's inviolability itself can require killing innocent human beings. Inviolability can mean violation, according to Dworkin.¹³⁶ Before we turn to its deep errors, let us examine some reasons why we ought to *hope* this contention is mistaken. Before discussing its falsity, I want to show that its results are quite unfortunate. First, Dworkin's thesis is harmful to us as a political community. It confuses public discourse and undermines social solidarity. Second, the idea that the inviolability of life, the sanctity of life, may require killing is a notion that may endanger others besides fetuses, about whom we care and whom we may wish to protect from violence.

With regard to the first sort of consequence: Before Dworkin, the arguments for and against abortion were fairly clearly divided.¹³⁷ At least the claims were clear, even if we could not see a way to reconcile them. On the one hand stood the value of liberty, and its defenders were called pro-choice. On the other hand stood the value of life, and its defenders were called pro-life. Dworkin would have both sides called pro-life. Each side would be defending its own version of the inviolability of human life. Politically speaking, how will it help public debate to have *Roe's* supporters shouting that life must be protected, and proclaiming that the anti-abortionists must be defeated in order to preserve the sanctity of life?

Dworkin's argument reminds one of George Orwell's famous claim in 1984¹³⁸ that "war is peace."¹³⁹ Of course, Orwell's totalitarian dictatorship used that formula purposely to paralyze public debate, and I am not alleging that Dworkin has any such nefarious purpose behind his theory, but the doctrine that violating life respects life's inviolability may have the same silencing effect. Furthermore, the lan-

134. 410 U.S. 113 (1973).

135. *LIFE'S DOMINION*, *supra* note 1, at 153; *see also supra* note 32 (discussing cases following the *Roe* decision).

136. *Id.* at 84-101, 196, 215.

137. *But see* Richard A. McCormick, *The Gospel of Life*, *AMERICA*, Apr. 29, 1995, at 10. McCormick claims that many have long believed that taking human life can on occasion be "life-saving and life-serving." *Id.* at 16.

138. *GEORGE ORWELL*, 1984 (1949).

139. *Id.* at 7.

guage in 1984, claiming that war is peace,¹⁴⁰ not only inhibited pro-peace efforts, it also mocked and debased those opposed to the war. They were told that their anti-war sentiments could not be articulated rationally. Similarly, to tell the pro-life community that its opponents are really equally (or more) pro-life, and that abortion respects life, seems to mock as well as to silence. Dworkin's contention seems purposely or accidentally to dumbify the anti-abortion view of the world and thus to make dialogue concerning abortion still more difficult.

Remember that Dworkin also scolds pro-lifers for claiming inconsistently to advocate a "right" to life for the unborn child. The pro-life community must share with the other side its argument regarding inviolability and must refrain from making its argument about rights. It is hard to see how the mutual self-respect that Dworkin promised¹⁴¹ can result from his proposal. Recall that Dworkin will use the power of the state to require people opposed to abortion to finance it.¹⁴² These people will be forced to acquiesce and participate in what they consider to be the killing of helpless children, without being able easily or fully to articulate their reasons for opposing this practice. It is hard to imagine a greater degree of political alienation on the part of pro-life people if Dworkin's views should become legally and socially dominant in America. Would their convictions wither away, or would they find expression in apolitical and violent forms?

In *Life's Dominion*, Dworkin does not seem to care much for notions of social solidarity and the building of community.¹⁴³ He believes that a society based simply on respect for rights should be our central aim, both in America and elsewhere.¹⁴⁴ Still, one must wonder if the kind of extreme anomie that his theory could engender would not be an uncomfortable world even for him. Dworkin admits that his theory requires the human community to eschew protection for its most basic values.¹⁴⁵ Abortion is not some peripheral concern. Dworkin points out that our "convictions about how and why human life has intrinsic importance, from which we draw our views about

140. *Id.*

141. *LIFE'S DOMINION*, *supra* note 1, at 10-11, 101.

142. *Id.* at 174-76.

143. Dworkin indicates as much, *id.* at 61-62, in criticizing the communitarian analysis of Mary Ann Glendon, an analysis that had been called "perceptive" by Catherine MacKinnon. See MacKinnon, *supra* note 40, at 1316 n.153 (citing GLENDON, *supra* note 28). *Freedom's Law: The Moral Reading of the American Constitution* is a more sensitive and open response by Dworkin to communitarian arguments unrelated to abortion. *FREEDOM'S LAW*, *supra* note 4, at 19-31.

144. *LIFE'S DOMINION*, *supra* note 1, at 61-62.

145. *Id.* at 154-55, 167.

abortion, are much more fundamental to our overall moral personalities than our convictions about culture or about endangered species, even though these too, concern intrinsic values."¹⁴⁶ Furthermore, Dworkin does not consider these fundamental values to be merely private. He contends that we ought not to be indifferent to others' abortions.¹⁴⁷ Those abortions may affect one's own moral environment and that of one's children, and of course, they may matter to us because we are concerned about the value of life itself, which we may think harmed by each abortion. Dworkin could also have added that the abortions that take place in our community may matter to us because of our concern not just for the value of life, but for the value of the mother-child relationship. After all, if one believes the fetus to be a human being, then it is not just any human being. It is a mother's own child.¹⁴⁸ That maternal relationship is surely in our culture and in most or all cultures an archetype of moral concern and care. Seeming to authorize and subsidize mothers to kill their children could be seen to remove a cornerstone of human community, with possibly disastrous consequences. There are many who believe, with Mother Teresa of Calcutta:

The so-called right to abortion has pitted mothers against their children, and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts—a child—as a competitor, an intrusion, and an inconvenience. It has nominally accorded mothers unfettered dominion over the independent lives of their physically dependent sons and daughters. And, in granting this unconscionable power, it has exposed many women to unjust and selfish demands from their husbands or other sexual partners.¹⁴⁹

Dworkin's contention that the inviolability of life may require killing¹⁵⁰ is also unfortunate in a second and much more direct sense: It

146. *Id.* at 154-55.

147. *Id.* at 167.

148. Stanley Hauerwas has pointed out that a fetus could be considered a child (as in the expression "unborn child," I would suppose) even without being considered a full rights-bearing person. See Stanley Hauerwas, *Must a Patient Be a Person to Be a Patient? Or, My Uncle Charlie Is Not Much of a Person but He Is Still My Uncle Charlie*, in *TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS IN CHRISTIAN ETHICS* 127, 128 (1977).

149. Mother Teresa, *Recalling America*, *FIRST THINGS*, May 1994, at 9, 9-10. She goes on to quote from the 1993 German abortion decision. See *id.* at 10.

150. *LIFE'S DOMINION*, *supra* note 1, at 84-101, 215.

endangers the lives of human beings who may matter to us more than fetuses do—infants and those whose lives are frustrated by disability, age, or even chronic economic hardship.

This danger is not a matter of empirical speculation but of logical entailment. Dworkin's reduction of our sense of life's inviolability to a desire not to waste investment requires that some lives be regarded as less inviolable than others and that killing be thought less bad when necessary to prevent net waste.

Let us look at this logic in greater detail. In a section of his book entitled "The Metric of Disrespect," Dworkin offers a "comparative tragedy" calculus for how much life's inviolability has been contravened by a particular act of killing or any other kind of premature death:

[H]ow bad this is . . . depends on the stage of life in which it occurs, because the frustration is greater if it takes place after rather than before the person has made a significant personal investment in his own life, and less if it occurs after any investment has been substantially fulfilled, or as substantially fulfilled as is anyway likely.¹⁵¹

In short, Dworkin believes that the measure of a life's inviolability is the amount of investment that would be wasted if that life were cut short.

Note that Dworkin is no longer limiting his waste-avoidance theory to fetuses and abortion. His use of the word "person" above clearly shows that he is speaking of postnatal deaths as well. Note, too, the profoundly inegalitarian thrust of his remarks. Even though he may continue to adhere to equal *rights*,¹⁵² Dworkin clearly considers some people's lives much less inviolable than others.

Infants, for Dworkin, are scarcely more inviolable than fetuses, for little has been invested in "mere biological development—conception, fetal development and infancy."¹⁵³ To really count, one's life must have been "determined not just by biological formation but by social and individual training and choice."¹⁵⁴ Thus, the "death of an adolescent girl is worse than the death of an infant girl because the adolescent's death frustrates the investments she and others have already made in her life."¹⁵⁵

151. *Id.* at 88.

152. *Id.* at 8.

153. *Id.* at 88.

154. *Id.*

155. *Id.* at 87. To be sharply distinguished is the obvious fact that the more we invest our time and effort in a child or in any other project, the more we care about it, and the

Some might disagree with Dworkin here, feeling that early death is more tragic, at least for the person who dies. The deceased adolescent at least enjoyed some time in the world; the dead infant had almost none. What is dangerous, however, is not Dworkin's right or wrong theory of tragedy but his making the measure of tragedy also the measure of inviolability, so that infants' lives can be violated with less compunction if their deaths are in some sense less tragic.

Failure to kill an infant may even be the greater tragedy, under Dworkin's schema,¹⁵⁶ so that the inviolability of life comes not only to permit but to require infanticide. Remember that the calculus of inviolability, as opposed to that of rights, makes no distinction in kind between human beings before and after birth, and that Dworkin is quite willing to engage in the comparative analysis of waste between mother and fetus. He says that "respect for the intrinsic value of human life" itself may require abortion because "the waste of life . . . is very much greater when a teenage single mother's life is wrecked than when an early-stage fetus, in whose life human investment has thus far been negligible, ceases to live."¹⁵⁷ What about the young woman who discovers only after birth that caring for a child will mean, in Dworkin's words, that her life "is wrecked"?¹⁵⁸ Could not the balance of waste favor infanticide? True, according to Dworkin, there has been more investment now than in early pregnancy, but it is still largely of the "mere biological" sort.¹⁵⁹ Moreover, giving the child up for adoption—a choice Dworkin already found unacceptable as an alternative to wasting a fetus¹⁶⁰—would now be far more onerous for the mother. Dworkin must admit in principle that his concept of the inviolability of the mother's life could mean that she should kill her newborn child.

We might expect a candid Dworkin to concede this claim—that his idea of inviolability considered alone could indeed favor infanticide—but to point out that, unlike the fetus, the newborn has moral and legal *rights*, and that these will suffice to preclude killing infants.

Such a response would, however, not fully allay our fears. If inviolability requires killing and rights oppose it, we know only that there is

more disappointed we are if it fails. This psychological truth, however, gives only a *subjective* importance to investment, felt mainly by the investor. What Dworkin claims is that *someone else's* investment grounds an objective, intrinsic value that *all* must acknowledge.

156. *Id.* at 84-101.

157. *Id.* at 99.

158. *Id.*

159. *Id.* at 88.

160. *Id.* at 103 (discussing the great emotional pain that may result from giving a child up for adoption).

a conflict, not which side will win. Morally speaking, could it not be sometimes better to violate a right than to wreck a woman's life? Furthermore, it is unclear that rights will remain legally firm once their moral underpinning weakens. Indeed, Dworkin himself seems to argue later in his book that the current life of a person with Alzheimer's may be such a waste that the right to live it disappears.¹⁶¹

Worse yet, Dworkin never attempts such a response. That is, he never argues that infants have an inherent right to life that protects them despite their relative lack of "intrinsic value."¹⁶² Although he seems to concede that infants (along with late-term fetuses) have interests,¹⁶³ Dworkin makes having interests only a necessary, not a sufficient, condition for having rights. He leaves explicitly open the question of whether newborn infants count as persons in more than a legalistic sense, writing: "[W]e might argue . . . that newborn infants are constitutional persons without deciding whether or not they satisfy whatever standards for consciousness we might think necessary for personhood in the philosophical sense."¹⁶⁴ Dworkin then cites a famous essay by Michael Tooley that argues for the moral permissibility of infanticide.¹⁶⁵ This, together with his earlier linkage of fetuses and

161. *Id.* at 219-33. Similarly, the American Medical Association's Council on Ethical and Judicial Affairs recently reiterated its 1994 opinion that it is "ethically permissible" to harvest vital organs from anencephalic infants while they are still alive, in part because those organs might deteriorate by or after death. Council on Ethical and Judicial Affairs, American Medical Association, *The Use of Anencephalic Neonates As Organ Donors*, JAMA, May 24, 1995, at 1614, 1617-18. Avoiding possible organ waste overrides the right to life in these cases. The accompanying comments of the Council indicate that an exception to "current law, which requires persons to be dead before their life-sustaining organs may be removed" is "consistent with the majority view among experts in medicine and ethics." *Id.* at 1614. Reminiscent of Dworkin's strictures against fetal rights, the Council argues that although anencephalic infants "may be able to breathe, suck, [and] respond to noxious stimuli with crying or avoidance maneuvers, [they nevertheless] are totally unaware of their existence and the environment in which they live." *Id.* at 1615. *But cf. supra* note 85 and accompanying text (noting that even caterpillars and carrots are in a way aware of their environments). Under great political pressure, this American Medical Association ethics committee has now reversed itself. See Diane M. Gianelli, *Ethics Council Reverses Stand on Anencephalic Organ Donors*, AM. MED. NEWS, Dec. 25, 1995, at 3. The Council grounded its reversal on doubts that all infants diagnosed as anencephalic in fact lack consciousness, rather than rejecting the idea that those who truly lack higher brain function can be used as organ donors. See *id.* Thus, according to ethicist Alexander M. Capron, "The reversal fails to address the troubling implication that any patients near death could be suitable as live organ donors if they were perceived as lacking higher brain function." *Id.*

162. LIFE'S DOMINION, *supra* note 1, at 73, 88.

163. *Id.* at 17.

164. *Id.* at 23.

165. *Id.* at 245 n.31 (citing Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37 (1972)).

infants as examples of "mere biological development,"¹⁶⁶ makes it seem unlikely that Dworkin would claim that killing infants violates anything more than the letter of the law. Where child care would waste a mother's life, would this legal technicality be sufficient to stop infanticide?

"Personhood" and "rights" in *Life's Dominion* have a wholly positivistic cast. There is no logical entailment in either direction between what Dworkin calls the "philosophical" question of whether an entity has personhood and the "practical" one of whether it should be treated as we treat each other.¹⁶⁷ This disjunction would seem to endanger even older children and adults, who Dworkin says "undeniably" have moral rights.¹⁶⁸ Why continue to grant all such entities a practical right to life when that right runs counter to our strong desire to avoid waste?

That Dworkin's approval of abortion should lead him sometimes to approve of infanticide is not surprising. It is not a conclusion he could avoid by more careful drafting, nor is it even just a necessary consequence of his own idiosyncratic theory of comparative investment and waste. The late Paul Ramsey issued a challenge to all those who favor abortion rights that still stands: Construct an argument for the moral permissibility of abortion that is not also an argument for the permissibility of infanticide.¹⁶⁹ Like others who have gone before him,¹⁷⁰ Dworkin has failed to meet this challenge. Better to wait for a new contender than to adopt Dworkin's theory, if we wish to hold to a strong postnatal right to life.¹⁷¹

166. *Id.* at 88.

167. *Id.* at 22-23.

168. *Id.* at 23.

169. See Paul Ramsey, *Reference Points in Deciding About Abortion*, in *THE MORALITY OF ABORTION* 60, 79, 86 (John T. Noonan, Jr. ed., 1970).

170. Ronald Green, for example, denies any inherent dignity in the infant in order to support a strong right to abortion. Seeking to meet Ramsey's challenge, the best Green could do was to urge continuation of the ban on infanticide as a *malum prohibitum*, because of the negative side effects that killing infants might have on others. See Ronald M. Green, *Conferred Rights and the Fetus*, 2 J. RELIGIOUS ETHICS 55, 65-66 (1974). Jonathan Glover, however, would disagree with Green. Glover argues that in the absence of an inherent infantile right to life, the side effects of infanticide need not lead us to prohibit it altogether. See JONATHAN GLOVER, *CAUSING DEATH AND SAVING LIVES* 137-69 (1977). Linking abortion and infanticide, Glover favors both. See *id.*

171. There may be more philosophical debate (as opposed to public debate) about infanticide than about abortion. Support for a fetal right to life is rooted fundamentally in the intuition that newborn infants possess a human dignity worthy of respect; anti-abortionists then argue that whatever dignity the infant possesses the fetus also possesses. See, for example, the German and other arguments found *infra* note 326 and accompanying text. The many academics who wish to deflect the force of this anti-abortion claim are thus

To summarize once again: Dworkin understands human life to be inviolable only to the extent that killing would result in a net waste of investment;¹⁷² where it produces a net investment gain, killing can be required by our sense of life's inviolability. Fetuses and infants, because they have less invested in them, are less inviolable than older human beings.¹⁷³ Their lives thus can be outweighed by others.¹⁷⁴

It might seem that Dworkin would concede a very high, or even absolute, degree of inviolability once a certain age had been reached, for at that point the level of investment would be so high that it could only rarely, if ever, be outweighed. It turns out, however, that age is only a very rough indicator of the amount of investment in a person's life. For example, although one ordinarily invests a great deal of creative energy in one's own development, Dworkin says this may not be so in "pathological cases."¹⁷⁵ Thus, people with disabilities severe enough to make "creative choices"¹⁷⁶ unlikely end up less inviolable. Though Dworkin does not say so explicitly, his theory would seem likewise to entail that children whose parents are able to be more creative or caring end up representing a greater investment and thus possess a greater inviolability. The child that has received "quality time" is more inviolable than one that has been neglected, one that has attended a Montessori school more inviolable than one that has lived on the streets.

Worse still, even those who have a large amount invested in them are not necessarily very inviolable, under Dworkin's theory. Their deaths surely cannot count as waste if their lives were already "wrecked" by an unwanted child¹⁷⁷ or, more generally, to the degree they were "frustrated by other forms of failure—by handicaps or poverty or misconceived projects or irredeemable mistakes or lack of training or even brute bad luck."¹⁷⁸ Death is less bad when "it occurs after any investment has been . . . as substantially fulfilled as is anyway likely."¹⁷⁹

It is less tragic, then, when persons die who did not have much of a future anyway. Their lives are less inviolable than those of healthy,

tempted to embrace the permissibility, at least in theory, of infanticide. See GLOVER, *supra* note 170, at 137-69.

172. See *supra* notes 111-113 and accompanying text.

173. See *supra* note 153 and accompanying text.

174. See *supra* note 155 and accompanying text.

175. LIFE'S DOMINION, *supra* note 1, at 83.

176. *Id.*

177. *Id.* at 99.

178. *Id.* at 89.

179. *Id.* at 88.

wealthy, and lucky people. Dworkin even suggests that some might be better off dead: "Is premature death always, inevitably, a more serious frustration of life than any of these other forms of failure?"¹⁸⁰ At first, it might be hard for us to see how any sort of frustration could be worse than the absolute frustration brought about by death. Dworkin's investment idea might seem to say only that individuals with handicaps are *less* inviolable than others, meaning that they ought to die if necessary to fulfill someone else's greater potential, not that their lives, considered in themselves, are a net waste.

Such a conclusion, however, would be short-sighted. Dworkin explains that handicapped life could actually be more wasteful than premature death, even without interpersonal comparisons, if ongoing life would mean "further, heartbreaking waste of personal emotional investments made in that life by others but principally by the [person with grave disabilities] himself."¹⁸¹ In other words, someone's life always requires continued investment—by the person himself and by others. If that anticipated future investment is going to be "irremediably frustrated,"¹⁸² it is actually less wasteful to cut one's losses by terminating life immediately.

Dworkin makes us feel a bit better when he says that poverty, even very great poverty, will only "rarely" make a child better off dead.¹⁸³ Nevertheless, when he later suggests that the life of Tolstoy's Ivan Ilych was a net waste because of his failure to advance his true interests,¹⁸⁴ we cannot but see just how open-ended is Dworkin's category of people who really ought to die prematurely.

If these people do not in fact die early—preferably before birth if future frustration can be predicted that soon—they may become people who anomalously should not exist, because their overall life is a waste, but who should not now die, apparently because the marginal amounts of investment they still need may yield a positive return.

In "the worst of such cases it would have been better had the life in question never begun."¹⁸⁵ Such an existence can be "intrinsically a bad thing. . . . [I]t is regrettable that such a deprived and difficult life must be lived."¹⁸⁶ Yet this is not a "Nazi" sentiment, Dworkin explains,¹⁸⁷ for once a great investment has been made in such people,

180. *Id.* at 90.

181. *Id.*

182. *Id.* at 98.

183. *Id.*

184. *Id.* at 203.

185. *Id.* at 99.

186. *Id.* at 98.

187. *Id.*

the "liberal position insists that these investments in life should be realized as fully as possible," out of a "horror at the investment being wasted."¹⁸⁸ Of course, if the burden of caring for such persons were sufficiently frustrating for their caretakers,¹⁸⁹ continued life could result in a further net loss of total interpersonal investment, and the same "horror at the investment being wasted"¹⁹⁰ would favor death.

Dworkin reminds us, however, that the rights of such people (once beyond infancy, at least) might stand in the way of killing them:

[T]he general question of the relative intrinsic tragedy of different events is very different from any question about the *rights* of people now living or about how they should be treated. The former is a question about the intrinsic goodness or evil of events, the latter about rights and fairness.¹⁹¹

If, however, the death of a severely impoverished or handicapped person is adjudged not very bad, or even intrinsically good, does this not weaken our sense of her right to life? Moreover, if infants may have rights only in a "practical" sense, because they lack sufficient consciousness to count philosophically as persons—as Dworkin is willing to suppose¹⁹²—might not persons with severe disabilities fall into the same category? Persons with mental disabilities may be even more liable than infants to having their rights ignored or taken away, for unlike healthy infants, they may lack even the possibility of higher forms of consciousness.

Even if Dworkin's ideas do not directly undermine legal rights, at the very least they deprive many vulnerable people of secondary moral protection from the traditional idea of the sanctity or inviolability of life. Prior to Dworkin, there were two reasons not to kill someone with Down's syndrome: because she had a right to life and because her life was sacred or inviolable. After Dworkin, only the first reason not to kill her is left. Indeed, the same inviolability that once motivated nonviolence may now, for Dworkin, actually favor her death.

Perhaps the greatest tragedy that could befall persons with frustrated lives would be for Dworkin's theory to gain widespread acceptance. By reducing the intrinsic dignity of life to the avoidance of waste, Dworkin would have us look upon each other in a stingy, begrudging fashion. At least before birth, and quite possibly after as

188. *Id.* at 99.

189. Dworkin points out it is "expensive, tedious, and difficult" to continue to care for seriously demented persons. *Id.* at 234.

190. *Id.* at 99.

191. *Id.* at 98.

192. *Id.* at 23.

well, Dworkin would have us kill in the name of the inviolability of life, but really out of a desire to hoard our resources rather than have them used for unfulfilled projects. As our expectations for fulfillment rise, more and more lives will come to seem unfulfilling. Our dreams of the good life will be nightmares for those who cannot achieve it, who should die or have died young.

We have seen so far that Dworkin's investment theory of inviolability tends to permit or favor killing the very young (because not much investment is thus wasted) and those with frustrating handicaps (because any investment in them is already largely wasted). It might seem, however, that Dworkin's inviolability would require protection from death at least for those people who lead fulfilling lives.

This supposition would be true only up to a point, the point at which an older person has more or less realized her life goals. Death is "less [tragic] if it occurs after any investment has been substantially fulfilled."¹⁹³ For people past their prime, "the conviction that human life is sacred may turn out to provide a crucial argument *for* rather than against euthanasia."¹⁹⁴

The concepts that Dworkin has already given us make this conclusion plausible. If an investment has already paid back almost everything that can reasonably be expected, its sudden end is not a tragedy. Even if a mine were once highly profitable, a destructive earthquake after its ore were nearly exhausted would no longer be considered a financial disaster. Similarly, if the marginal return on further investment were low enough (the investment would be "frustrated," in Dworkin's words),¹⁹⁵ then the avoidance of waste could dictate purposely closing down the once-profitable mine—all the more so if keeping it open deprived a second, more promising mine of scarce investment funds. A past successful life does not make being killed a tragedy.

Dworkin argues more. Not only is prior fulfillment a reason to *permit* euthanasia, it may be a factor in *favor* of killing the old.¹⁹⁶ This is so because of an additional ethical demand to which Dworkin appeals: that our lives be good stories. Dworkin suggests judging a human life "as we judge a literary work . . . whose bad ending mars

193. *Id.* at 88.

194. *Id.* at 196.

195. *Id.* at 87.

196. People who think human investment in life important will "insist that sometimes euthanasia *supports*" the sanctity of life in those "riddled with disease or no longer conscious." *Id.* at 215.

what went before."¹⁹⁷ It is not "zoe,"¹⁹⁸ physical life, that has inviolability, but rather "biography."¹⁹⁹ When a successful person becomes incompetent, we "worry about the effect of his life's last stage on the character of his life as a whole, as we might worry about the effect of a play's last scene or a poem's last stanza on the entire creative work."²⁰⁰ An anticlimax may be worse than death in that it may leave a person "a narrative wreck . . . a life worse than one that ends when its activity ends."²⁰¹

The inviolability of biography may even require going against the explicit desires of the aged, to favor their "critical interests"²⁰² over their immediate "experiential interests."

Suppose a demented patient insists on remaining at home, though this would impose very great burdens on his family, and that we all agree that people lead critically better lives when they are not a serious burden to others. Is it really in his best interests, overall, to allow him to become such a burden?²⁰³

Dworkin does not ignore the value of autonomy, but neither does he give it absolute priority over biography. Moreover, the idea of biography becomes part of the meaning of autonomy for Dworkin, so

197. *Id.* at 27.

198. Dworkin explains that the Greeks used the term "zoe" to refer to physical or biological life. *Id.* at 82.

199. *Id.* at 82-83.

200. *Id.* at 199.

201. *Id.* at 211. Without mentioning him by name, the United States Court of Appeals for the Ninth Circuit comes extremely close to Dworkin's theory. In *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996), the court writes:

A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent. How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.

Id. at 814. For further discussion of this case, see *supra* note 5.

202. There may be a tension between Dworkin's position here and his earlier rejection of "critical paternalism." See Ronald Dworkin, *Foundations of Liberal Equality*, in 11 THE TANNER LECTURES ON HUMAN VALUES 1, 47 (Grethe B. Peterson ed., 1990) (acknowledging the problems and obscurities of the idea of critical interests); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 484-86 (1989) (challenging the argument of critical paternalism that is often used to attack liberal tolerance). For other critiques of moral paternalism, referring to the work of John Rawls and of Neil MacCormick as well as of Dworkin, see Stith, *Critique of Fairness*, *supra* note 21; Richard Stith, *On the Preservation of Morality*, 20 VAL. U. L. REV. 71 (1985); and Richard Stith, *Will There Be a Science of Law in the Twenty-First Century?*, 22 REVUE GÉNÉRALE DE DROIT 373 (1991).

203. LIFE'S DOMINION, *supra* note 1, at 221.

that only those decisions one makes with one's critical interests in view really count.²⁰⁴

"Dignity," says Dworkin, "is a central aspect of the value we have been examining throughout this book: the intrinsic importance of human life."²⁰⁵ Thus, "[w]e are distressed by, even disapprove of, someone . . . who neglects or sacrifices the independence we think dignity requires."²⁰⁶ In fact, the indignity of dependence seems "worse when the indignity is not recognized by its victim."²⁰⁷ "Someone who compromises his own dignity denies . . . a sense of himself as someone with critical interests, the value of whose life is important for its own sake."²⁰⁸ "[N]o one treats his life as having any intrinsic, objective importance unless he insists on leading that life himself, not being ushered along it by others, no matter how much he loves or respects or fears them."²⁰⁹ Could we even be doing such people a favor by killing them before (or after) they make the undignified choice to become dependent? Not surprisingly, Dworkin quotes Nietzsche with approval: "In a certain state it is indecent to live longer. To go on vegetating in cowardly dependence on physicians and machinations, after the meaning of life, the right to life, has been lost, that ought to prompt a profound contempt in society."²¹⁰ Note

204. *Id.* at 235-36.

205. *Id.* at 236.

206. *Id.* at 235.

207. *Id.*

208. *Id.* at 237.

209. *Id.* at 239. Once again, watch out for Dworkin, you monks! Dworkin clearly opposes voluntarily imitating Christ, "taking the form of a slave," *Phil.* 2:7, humbly "obedient even unto . . . the death [without dignity] of the cross," *Phil.* 2:8.

210. *LIFE'S DOMINION*, *supra* note 1, at 212 (quoting Friedrich Nietzsche, *The Twilight of the Idols*, in 16 *THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE* 1, 88 (Anthony M. Ludovici trans., Oscar Levy ed., 1964)). Nietzsche has elsewhere elaborated:

If the degenerate and sick . . . [are] to be accorded the same value as the healthy . . . then unnaturalness becomes law—

This universal [Christian] love of men is in practice the *preference* for the suffering, underprivileged, degenerate: it has in fact lowered and weakened the strength, the responsibility, the lofty duty to sacrifice men. All that remains, according to the Christian scheme of values, is to sacrifice oneself: but this residue of human sacrifice that Christianity concedes and even advises has, from the standpoint of general breeding, no meaning at all. The prosperity of the species is unaffected by the self-sacrifice of this or that individual (—whether it be in the monkish and ascetic manner or, with the aid of crosses, pyres, and scaffolds, as "martyrs" of error). The species requires that the ill-constituted, weak, degenerate, perish: but it was precisely to them that Christianity turned as a conserving force . . .

If one does not feel such a disposition as an extreme immorality, as a crime against life, one belongs with the company of the sick and possesses its instincts oneself—

that such cowardly and contemptible vegetables lose the *right* to life along with its meaning. Dworkin's concern for autonomy leads him to abandon those who choose to reject it.²¹¹ He suggests that actively killing dependent, demented people might sometimes be called for, even if they are happy and *asking to live*, in order to tell the story that is best for them.²¹²

Is this notion of "life as biography" entailed by Dworkin's basic theory of inviolability? If so, then he might have to favor wiping out endangered species, because their glory days seem to be over and they have no constitutional rights. What a sad story it would be for the California condor to eke out life in various zoos. And if the Sistine Chapel could not be brightened up again, well, it might be better just to whitewash it over.

Clearly, Dworkin would reject these suggestions. For our analytic purposes, this means that it is neither sufficient nor necessary to deal fully with Dworkin's idea of what makes a good story in order to critique his core concept of inviolability as not wasting investments.

....
Nothing would be more useful or more to be encouraged than a thorough-going *practical nihilism* . . .

Problem: with what means could one attain to a severe form of really contagious nihilism: such as teaches and practices voluntary death with scientific conscientiousness (—and *not* a feeble, vegetable existence in expectation of a false afterlife—)?

FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 142-43 (Walter Kaufmann & R.J. Hollingdale trans., Walter Kaufmann ed., 1967). Has Dworkin found the solution to Nietzsche's "problem"?

211. What Mary Ann Glendon writes with regard to American law in general applies with special force to Dworkin: "By making a radical version of individual autonomy normative, we inevitably imply that dependency is something to be avoided in oneself and disdained in others." GLENDON, *supra* note 91, at 73.

212. *LIFE'S DOMINION*, *supra* note 1, at 221-33. Although Dworkin argues especially strongly for this conclusion when a prior, competent death wish has been expressed, he suggests that killing may be correct even without that earlier authorization by the patient, out of a beneficent desire to further the patient's own critical interests. *Id.* at 232-33. The Ninth Circuit has shown an openness to similar nonvoluntary killing:

[T]here is, in short, a constitutionally recognized "right to die." Our conclusion is strongly influenced by, but not limited to, the plight of mentally competent, terminally ill adults. We are influenced as well by the plight of others, *such as* those whose existence is reduced to a vegetative state or a permanent and irreversible state of unconsciousness.

Compassion in Dying v. Washington, 79 F.3d 790, 816 (9th Cir.) (emphasis added), *cert. granted sub nom.*, Washington v. Glucksberg, 117 S. Ct. 37 (1996). The court again indicates where it is impatiently heading when it writes "*for present purposes* we view the critical line in right-to-die cases as the one between the voluntary and involuntary termination of an individual's life," *id.* at 832 (emphasis added), but adds just a sentence later, "we should make it clear that a decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself." *Id.* at 832 n.120.

Even if he were wrong about biography, he might still be right about his investment theory. On the other hand, if he is wrong about wasting investments, then he must be wrong both about how inviolability in its simpler form applies to the young and the handicapped, and about how inviolability in its more complex form, where it joins the idea of biography, applies to the aged. Therefore, we shall not delve deeply into Dworkin's notion of what constitutes a critically good life, although it occupies a significant portion both of *Life's Dominion* and of his prior work.²¹³ By showing that Dworkin has made fundamental errors in interpreting the inviolability of life as only a "horror at the investment being wasted,"²¹⁴ we undercut at once his every argument for death.

IV. DWORKIN'S MISTAKE: IGNORING THE INDIVIDUAL

The previous section of this Article brought out consequences of Dworkin's theory of inviolability that many might regard as unfortunate: its harm to public discourse and to the lives of certain vulnerable people. Such results do not, however, invalidate his theory. At most, they give us a reason to reexamine his analysis with greater care. If reexamination discovers no error, however, we may just have to learn to live, or die, with the disagreeable truths Dworkin has unearthed.

The words "error" and "truth" have a special meaning here. We need not look only for obvious misreporting of facts or for false logical entailments. Dworkin has made primarily a coherence claim. He has begun with certain data concerning our attitudes toward pre- and postnatal life and has suggested that the most coherent interpretation of these data is found in the desire not to waste investment.²¹⁵ To show him in error can mean just showing that his theory has interpreted these and other data less coherently than would a different theory. Such a showing would give us an out, would mean that we need not accept his recommendations for death after all.

As we have seen, Dworkin begins by noting that both liberals and conservatives acknowledge an "intrinsic value," not just an "instrumental value," in the fetus,²¹⁶ though they may disagree on the degree of that intrinsic value. That is, they consider that prenatal life has value for its own sake, not only for the good it may do for others.

213. Chapters 7 and 8 of *Life's Dominion* are devoted to this topic, as are Dworkin's articles cited *supra* note 202.

214. *LIFE'S DOMINION*, *supra* note 1, at 99.

215. *Id.* at 84-89.

216. *Id.* at 72.

Dworkin rightly adds:

[T]he claim that human life even in its most undeveloped form has intrinsic value . . . raises unique puzzles. Why does it not follow, for example, that there should be as much human life as possible? Most of us certainly do not believe that. On the contrary, it would be better, at least in many parts of the world, if there were less human life rather than more. Then how can it be intrinsically important that human life, once begun, continue? Those are important questions, and in answering them we will discover a crucial distinction between two categories of intrinsically valuable things: those that are *incrementally* valuable—the more of them we have the better—and those that are not but are valuable in a very different way. I shall call the latter *sacred* or *inviolable* values.²¹⁷

Human life is different from most things we consider to have intrinsic value. We usually wish not only to protect intrinsically valued objects, but also to have more of them. We wish not only to preserve and transmit knowledge, for example, but also to increase it. It has "incremental" intrinsic value.²¹⁸ Dworkin might have added that there is a fairly rational correlation between the intrinsic value of an object in actuality and its discounted but always positive value in potentiality. Yet in the case of human beings, as in the parallel cases of art and animal species, we often consider them to have intrinsic value only after they have come into existence. Individually or collectively, we may well care little about, or even be averse to, having more children, and yet at the same time consider every fetus or infant to be of intrinsic worth. Dworkin calls this odd subset of intrinsically valued objects "sacred."²¹⁹ "The hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because—and therefore only once—it exists."²²⁰

I have no quarrel with Dworkin's report that most of us perceive human beings, even before birth, to possess what he calls "inviolability" and that the nature of this inviolability is puzzling. His fundamental errors lie in his solution to this puzzle.

Faced with the fact that it makes no sense to care greatly about an existing, intrinsically valued entity, and yet to care possibly not at all for the same entity *in potentia*, Dworkin suggests that what is valued

217. *Id.* at 70.

218. *Id.* at 73.

219. *Id.* at 70.

220. *Id.* at 73-74.

must be that which is added as the entity comes into existence.²²¹ The strange notion of inviolability thus has been explained. Analogously, we might surmise that insofar as churches are felt sacred—inviolable once they exist but not something we necessarily want more of—this feeling could be because what we really value are bricks. Perhaps the reason we would not wish to smash a church is that we would not wish to waste bricks, assuming them not recoverable. We could still consistently refuse to contribute to the construction of additional places of worship. What we really valued in an inviolable entity would be not the result but the investment. This investment or “effort”²²² would have the ordinary, rationally understandable kind of incremental intrinsic value: Dworkin treats past and future investments equally and finds “waste” of actual or potential investments to be of similar intrinsic disvalue.²²³

Though he continues to use the word “intrinsic” to describe the value of life,²²⁴ Dworkin cannot mean what he says, or perhaps he means “intrinsic” only as opposed to “instrumental.” He does not reduce human beings to instruments to be used by others, but he values human lives for what has gone into them rather than for what they are: “[T]he nerve of the sacred lies in the value we attach to a process or enterprise or project rather than to its results”²²⁵

Dworkin’s first fundamental error is simply his denial that human beings themselves matter, not just the creative effort going into them.²²⁶ There is another, better way to explain the puzzles of inviolability. Instead of giving up the fuller notion of “intrinsic,” Dworkin should have abandoned the idea of “valuing” in favor of “respect” or “reverence.” Sticking with the idea of value is his second, and still more fundamental, error. In other words, Dworkin is wrong both about the object and about the attitude involved in the sense of inviolability. That object is the inviolable being itself, not what goes into it. That sense or attitude is one not of evaluation but of deference.

Each of Dworkin’s two errors obscures an aspect of the human individual. His notion of investment ignores the individual in the etymologically central sense of an undividable whole, focusing instead on that of which (or from which) she is made.²²⁷ The attitude of valuing

221. *Id.* at 78-79.

222. *Id.* at 79.

223. *Id.* at 84-101.

224. *Id.* at 99.

225. *Id.* at 78.

226. *Id.* at 84.

227. *Id.*

ignores the nonfungible particularity of each individual, caring only about the kind of being of which she is an instance. Let us examine these two errors one at a time.²²⁸

A. *Investment Ignores Individuality*

To test the hypothesis that we care about bricks rather than churches, we would look to whether we cared equally about other forms of brick construction. If we found that smashing brick houses and patios were a matter of little concern to us, we would have to reject the love of bricks as an explanation for the inviolability of churches.

When we apply this same test to Dworkin's theory, however, it fails. By his own admission, we are "selective" in finding inviolability where there has been human or natural investment,²²⁹ and Dworkin can adduce no pattern in our selectivity:

We do not treat everything that human beings create as sacred. We treat art as inviolable, but not wealth or automobiles or commercial advertising, even though people also create these. We do not treat everything produced by a long natural process—coal or petroleum deposits, for example—as inviolable either²³⁰

We are equally selective about divine investment: "Only God can make a tree," but we still cut them down rather freely. Because investment does not necessarily produce inviolability, there must be a better way to understand the demands of human life, art, and animal species.

Could it be that Dworkin has it exactly reversed, that the perception of making, or of investment, actually *desanctifies* a result? He himself admits that "we do not think . . . artificially produced species are intrinsically valuable in the way that naturally produced species are."²³¹ Yet even nature—the original creation of life and its subsequent evolution—might no longer produce a sense of the inviolable

228. Virtually no reviewers of Dworkin's book have tried to challenge him on his erroneous explanation of the no-production-yet-no-destruction paradox. See *supra* note 11. Kamm's piece does suggest that the subjective effect of death on the entity that dies is a disvalue that can arise only for entities that already exist. See Kamm, *supra* note 11, at 179. Her approach, however, would help explain the paradox only with regard to entities that have rights or at least interests, a status that Dworkin denies to many fetuses that he says possess a measure of inviolability.

229. *LIFE'S DOMINION*, *supra* note 1, at 80.

230. *Id.*

231. *Id.* at 78-79.

in us if it could be reduced to a series of discrete and comprehensible steps.

Making demystifies; investing desacralizes—and not merely because knowledge of process minimizes or eliminates any role for a deity. To the degree that secular, human art comes to seem artificial, to seem the result of a learnable process of production, of technique, it also loses much of its inviolability.

Why is this so? Fundamentally, because a made thing has already been violated; from the beginning of its being it has been composed of separate parts. Better put: There is nothing in it to violate. If it is only the sum of what went into its making, then nothing is destroyed when it is broken apart again. Only something individual—that is, undividable—can be inviolable. Only as we forget a product's origins and components do we come to see it as a formal unity and thus possibly as inviolable. (Thus genetic explanation is often degrading.) Dworkin's reductionism obscures whatever inviolability we might otherwise sense. Indeed, investing is still more reductionistic than making, for it does not even produce something with parts. "Investment" connotes a reserve with no shape at all, like Dworkin's "coal or petroleum deposits."²³² It results only in a collection or stockpile, not in an entity.²³³

With regard to human life in particular, Dworkin does have it backwards. Consistent with his theory, he suggests that a planned pregnancy is more inviolable than an accidental one, not from considerations of fairness to the fetus, but "because a deliberate decision of parents to have and bear a child is of course a creative one,"²³⁴ thus involving greater human investment. If Dworkin were right, then test-tube embryos, products of surrogacy, and the like ought to induce in us the greatest sense of the sacred, in that they add much more human effort to that of nature. Yet in fact, one of the chief objections to biological engineering is that it actually lessens our sense of life's sanctity.

Another way to test Dworkin's theory (that the inviolability of life is directly related to the waste of investment caused by its destruction)²³⁵ would be to look carefully at deaths in which waste is minimal—analogueous to looking at churches made with very few bricks. If

232. *Id.* at 80.

233. For further discussion of the idea of a stockpile, see *supra* note 95 and accompanying text.

234. *LIFE'S DOMINION*, *supra* note 1, at 83.

235. *Id.* at 84.

we find a sense of inviolability even there, then Dworkin's investment idea again does not work.

It is surely common for the sick and aged, and for their caretakers, to wish for death and, if they are religious, even to pray for it. In Dworkin's terms, their deaths would not be tragic because any investments have been already as fulfilled as possible.²³⁶ Why are most of us nevertheless reluctant to cause death intentionally? Do we not hold back out of a sense of life's sanctity or inviolability, despite the fact that death would be welcome?

Admittedly, some people no longer have a strong sense of the inviolability of life in such situations, and Dworkin's theory indicates that we ought to get over our qualms. The point here, however, is empirical, not moral. It is quite common for a person to hold strongly, consciously, and at the very same moment, both to a sense that death would not be tragic and to a sense that life may not be destroyed. Therefore, Dworkin's calculus of tragedy cannot be an adequate metric for inviolability. Indeed, the very fact that he has to work so hard to change our feelings with regard to euthanasia shows that his theory is not accurately founded on those feelings.

Consider also mass murder: According to Dworkin's theory, we ought to feel worse about Nazis gassing young to middle-aged adults than we do about the Nazis' destruction of little children, the seriously disabled, and the very aged because, although all had their rights equally violated, only the deaths of the former caused great waste of investment.²³⁷ In fact, we are more aghast at the wanton killing of the absolutely helpless and defenseless. It is precisely in the most vulnerable and least capable, those furthest from the usual standards of human excellence, that the sanctity or inviolability of life stands out with greatest clarity. The Nazi slaughter of infants seems a direct, flagrant, arrogant, and inexcusable attack on the dignity of life. To shoot a crippled child is more horrifying, even if in some way less tragic, than to do the same to a healthy adult. When pro-lifers call abortion "the killing of a defenseless baby," they are arguing that it is actually worse than the usual sort of homicide.

Even where Dworkin's theory seems to work, where there is a rough correlation between investment and inviolability, a careful phenomenology will reveal that it is the human being that we care about, not what went into making that being. For example, Dworkin claims repeatedly that almost everyone thinks late abortion worse than early

236. *Id.* at 88.

237. *Id.* at 87.

abortion.²³⁸ As discussed previously, this too is a universal claim,²³⁹ but even where it accurately reflects people's views, it does not validate Dworkin's theory. Dworkin argues in effect that the unborn child is being constructed (rather than developing itself) in the womb,²⁴⁰ and that people gradually care more about a fetus as it gets older because it then has more invested in it.²⁴¹ Yet many such people acknowledge fetal dignity, not in the effort expended, but in the results achieved, and not so much as a gradual matter of degree as a sudden threshold of recognition. Once the fetus is recognizable as a child, many become at once reluctant to abort her. Dworkin acknowledges this, writing: "[T]he more like a child the aborted fetus has already become—the worse it is."²⁴² He ignores this fact for theoretical purposes, however, because, he claims, "increasing resemblance alone has no moral significance."²⁴³ One could disagree with this contention of his,²⁴⁴ but even if it were true, we are not yet at the point of moral theory. We are first seeking accurately to discern and report what it is that we perceive to be sacred or inviolable. Dworkin says it is investment, but in truth it is the individual human image.

If Dworkin were ever to seek to console a parent who had lost a child through miscarriage or stillbirth, he would do well to avoid speaking of a tragic "waste of human investment"²⁴⁵ and concentrate instead on the loss of that child herself. It is not the bricks but the building that matters, not the human input (nor the natural or divine input) but the human being that has dignity and inviolability.

Dworkin makes a similar mistake at the other end of the human lifespan, arguing that it is life's output, its biography, that matters, not the aged human body itself.²⁴⁶ He does notice that even demented or "vegetating" persons have human dignity and a right to be treated correspondingly.²⁴⁷ Indeed, one should emphasize that this human dignity is what makes their present condition tragic. There is nothing regrettable about the existence of real tomatoes or other vegetables.

238. See, e.g., *id.* at 86-87.

239. See *supra* notes 67-68 and accompanying text.

240. LIFE'S DOMINION, *supra* note 1, at 82-83 (discussing that each human being is the product of natural and human creation and investment).

241. *Id.* at 89 ("[A]s fetal growth continues, the natural investment that would be wasted in an abortion grows steadily larger and more significant.").

242. *Id.* at 86-87.

243. *Id.* at 89.

244. See James Q. Wilson, *On Abortion*, COMMENTARY, Jan. 1994, at 21, 24, and the discussion of the significance of the human image *infra* at text accompanying notes 300-317.

245. LIFE'S DOMINION, *supra* note 1, at 92.

246. See, e.g., *id.* at 199.

247. *Id.* at 233-34.

Dworkin also rightly sees that the contrast between how a person once appeared and how she now appears may be tragic.²⁴⁸ He is wrong, however, to find the full explanation of our sense of tragedy in the notion of biography, the idea that her present condition makes a poor ending and, therefore, that the supposedly vegetating individual may be "better off dead."²⁴⁹

If a great athlete, an Olympic champion, is crippled by some accident, she retains her dignity because of her humanity and because of her past achievements. She may be only a remnant of what she once was, but that remnant is honored because it is still recognizable as an imperfect image of something greater. It is not merely some anticlimactic and eliminable appendage of what would otherwise be a good story. To say she ought to die, or ought to have died in the accident, is to attack her present dignity, not to acknowledge it. For she is her body, not her biography.

Dworkin's error is to confuse life itself with the input (investment) into life and the output (biography) from life. Life is not something added to or produced by human or animal organisms, it is those organisms themselves. To say that someone's physical life has no further worth is to say that person has no further worth. Richard Neuhaus, in a sentence quoted by Dworkin, has it almost right: "[T]he question [of] whether life is good [for] the person gets things backward [L]ife is a good of the person" ²⁵⁰ Hamlet said it even better: "To be or not to be, that is the question" ²⁵¹ Physical life is the person; if Hamlet kills himself, he no longer exists. To be biologically alive is the only way we can exist in the present world; to die is to cease to be entirely—not to live on as biography or as anything else. We may well wish it were not so. We may wish that we ourselves and those we love were not condemned to wither away. Nevertheless, that is just the way it is, and to imagine that the human person is hiding somewhere (maybe in a story) other than in that shriveled body on the bed is dangerous romanticism.

Dworkin's admitted reluctance to degrade even the comatose²⁵² demonstrates that that body, all that is left of the person, has dignity because of the human design it once manifested and still possesses. Our human dignity, and our right to be treated with dignity, can

248. *Id.* at 199.

249. *Id.* at 193.

250. *Id.* at 214 (quoting Richard John Neuhaus, *The Return of Eugenics*, COMMENTARY, Apr. 1988, at 15, 22).

251. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, line 64 (Washington Square Press 1976).

252. *LIFE'S DOMINION*, *supra* note 1, at 233-34.

never leave our body, as long as we live. Even if I will otherwise, even if I write down a wish for euthanasia in a "living will," I cannot destroy respect for my incarnate personhood, any more than I can sell myself into slavery or waive my right not to be maimed or tortured.²⁵³ A good theory of inviolability must explain, not explain away, how the *humanum*, merely being a living human individual, continues thus to matter.

That theory need not be committed *a priori*, however, to the moral conclusion that the sanctity of life is absolute. Dworkin did not create the value of investment or of biography out of thin air. Nietzsche and many others may well feel that how they are remembered is more important to them than the humble and dependent being they will someday become if death does not first intervene.²⁵⁴ Nothing I have written up to this point proves that such a preference ought not to count.²⁵⁵ I have insisted only that we recognize, as Dworkin does not, that the inviolability of human existence works always against rather than for the desire intentionally to cause death.

When I made a similar argument once before to Dworkin, he responded that the inviolability of life cannot simply mean that "it is wrong to kill people."²⁵⁶ The significance of sanctity, he wrote, cannot be found "just in the idea that the existence of life is valuable in itself, because it would follow . . . that it is desirable to produce as much life as we can."²⁵⁷ In other words, Dworkin defends shifting from valuing individual life to valuing investment because he sees no other way to explain the actuality-possibility discrepancy we have noticed before in our attitudes toward human beings. There is in fact another alternative—rejection of the idea of valuing altogether. Life could be inviolable not because it *or* investment is valued by us, but because it lays a claim of respect upon us.

253. These are limits on my autonomy with which Dworkin agrees. *Id.* at 259 n.23.

254. *See supra* note 210 and accompanying text.

255. *See* REPORT OF THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT (1994) (providing a good summary of theoretical and practical arguments against assisted suicide and euthanasia).

256. Ronald Dworkin, N.Y. REV. BOOKS, Mar. 28, 1991, at 73 [hereinafter N.Y. REV. BOOKS].

257. *Id.* at 73. Dworkin was responding to my letter criticizing his article entitled *The Right to Death*, which had been published in the same journal on January 31, 1991, and was later substantially incorporated into *Life's Dominion*.

B. *Valuing Ignores Particularity*

Dworkin's second fundamental error is to remain fixed to the attitude of valuing²⁵⁸ rather than rejecting it in favor of the stance we shall soon describe and call "respect" or "reverence." Only this latter stance can discern particular individuals within the mass of humanity. Before proceeding, however, let us review and amplify the data we seek to understand.

Without abandoning concern for human individuals as such—without turning to investment or something else as our object of concern—we need to make sense of the fact that we often try both not to destroy existing humans and not to produce more of them. There is also a related basic datum that Dworkin overlooked: As the word itself implies, inviolability is much more offended by the willful violation of life (or art or anything else felt inviolable) than by its chance nonpreservation.

Consider the recent massacres in Rwanda, an example of intended genocide.²⁵⁹ No one would have difficulty seeing them as a monstrous violation of the sanctity of life. Especially the clubbing to death of the very young and very old, as with parallel Nazi killing,²⁶⁰ fills us with horror. The assailants seem to have been oblivious to the basic sanctity or inviolability of life, transgressing it wholesale. Yet few if any of us would react similarly to an equally lethal earthquake in India. The tragedy of wasted investment is, by hypothesis, the same, but we would not describe the earthquake as an injury to life's sanctity. The inviolability of life is just not at issue in natural events, even violent ones, although the same loss of investment may be there. It would seem silly and irrelevant to say of someone, "Her life (or the sanctity of her life) was violated by that big boulder that fell on her." The inviolability of life is a claim or demand on human agency, not on natural forces.

Similarly, we do not now think that the inviolability of life is at stake in the AIDS epidemic, but we surely would think so if the government decided to combat AIDS by killing its human carriers. Our sense of life's inviolability also does not require us to spend taxes to maximize the human lifespan, or even to cure AIDS or cancer, in the

258. See *infra* notes 263-275 and accompanying text.

259. See generally ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* (Alison Marschner trans., 1995) (placing Rwandan genocide in historical context and calling for political action).

260. See generally ANATOMY OF THE AUSCHWITZ DEATH CAMP (Yisrael Gutman & Michael Berenbaum eds., 1994) (collecting essays describing the operation of the Auschwitz death camp).

way it requires us to refrain from murder. More concretely, it is common for people who would never think of killing themselves or others, because of the inviolability of life, to decide to do little or nothing extraordinary to preserve it in the face of overwhelming and incurable illness.

In *Life's Dominion*, Dworkin wholly ignores these active-passive and intentional-accidental contrasts,²⁶¹ claiming that the inviolability of life weighs equally against all wastes of investment, whether by intentional killing or by not preserving. Indeed, he is so far from the world in which we really live that he actually claims that the inviolability of life may require us actively and intentionally to increase the number of deaths, wherever not doing so would let poor lives continue.²⁶² He thinks the sanctity of its own life could demand the abortion of a severely disabled fetus, for example,²⁶³ later adding: "[I]n some state a majority . . . might come to think it shows *disrespect* for the sanctity of life to continue a pregnancy . . . in cases of fetal deformity."²⁶⁴ Anything is possible, but such talk would seem gibberish almost everywhere today, even among those who favor prenatal euthanasia. To let life alone does not violate it.

The properly sharp disjunction between intentional destruction and unintentional nonpreservation is even clearer in the case of art, perhaps because our relation to art is not so complicated by duties that arise from sources other than sanctity. An art history teacher once told me of a sale of a large piece of land in which buyer and seller quarreled over who should pay the enormous costs of removing certain unsalable monumental sculptures that neither party wanted or valued. Clearly, the simplest and cheapest solution would have been to destroy the sculptures and cart away the pieces. "The sanctity of art" made this impossible. At the same time, the low value of the works of art justified doing little or nothing to *preserve* them from gradual destruction by the weather. To take another example: Official or private vandalism of a work of art involves clear disrespect for the artwork's sanctity, but no violation of the sanctity of art occurs when an artist gives up a project in frustration, nor when the government refuses to subsidize its completion or its preservation.

261. Curiously, the amicus brief Dworkin later coauthored gives great importance to the latter contrast. See Dworkin, *Assisted Suicide: The Philosopher's Brief*, *supra* note 5, at 42.

262. *LIFE'S DOMINION*, *supra* note 1, at 90.

263. *Id.*

264. *Id.* at 159. Dworkin seems to oppose forcing women to abort in such cases, but why a mother should have a right to impose an exceedingly frustrating life on her child remains unclear under his theory.

Sanctity thus draws a sharp line between intentional destruction, which it forbids, and unintentional nonpreservation, which it permits. Any adequate theory of sanctity must account for this dramatic difference. Dworkin's theory just ignores it. Gerard Bradley has rightly taken him to task for being virtually unconcerned with the role of intention in matters of life and death.²⁶⁵ Dworkin likewise considers the distinction between action and inaction "apparently irrational."²⁶⁶ That is saying that the sense of sanctity or inviolability is itself irrational, which is a way of admitting that one has no good theory of it.

Once we move away from the pure cases of intentional action and unintentional omission, to cases of unintentional action and intentional omission, the demands of inviolability become less clear. For example, Catholic medical ethics does not consider the foreseeable death of a patient by a potent dose of morphine to be a violation of the norm against intentional killing, provided that there is no other way to relieve the patient's extreme pain and that the consequent death, while predicted with certainty, is not intended as the object of the injection.²⁶⁷ Many laypeople might still have qualms and might need quite a bit of pastoral convincing, however, before they would feel comfortable knowingly (though unintentionally) causing someone's death. Even homicide as a result of a wholly unavoidable vehicular accident—running over a child who darts from some bushes after a ball, for example—makes one a killer, in the sense of being someone who has caused another's death, albeit one we think legally and morally excused. The driver of that vehicle is going to feel an anguish that will be spared a passenger or an onlooker. Horror at being a cause of death, even an unintentional one, was once actually dominant in the law. In the European Middle Ages, every agent of death—conscious or unconscious, man, beast, or inanimate thing—was polluted by the desecration of life and had to purge itself by atonement or redemption.²⁶⁸

265. See Bradley, *supra* note 11, at 387.

266. LIFE'S DOMINION, *supra* note 1, at 184.

267. See CATECHISM OF THE CATHOLIC CHURCH 549 (1994) ("The use of painkillers to alleviate the sufferings of the dying, even at the risk of shortening their days, can be morally in conformity with human dignity if death is not willed as either an end or a means, but only foreseen and tolerated as inevitable.").

268. See FREDERICK POLLOCK & FREDERICK W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW 470-73 (2d ed. 1905); Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1916); see also GEORGE FLETCHER, RETHINKING CRIMINAL LAW 343-357 (1978) (discussing extensively the still-extant practice of "tainting" individuals solely because their acts result in the death of another human being). Consonant with the theory of this Article, Fletcher points out that even today, the "law of homicide is built on the premise that everyone has a duty not to

Likewise, intentional but passive permitting of death is something about which the demands of sanctity may be unclear. Although I previously mentioned that some people wish or pray for the deaths of those caught in irremediable suffering, I doubt that all of us would feel comfortable with wishing death upon someone. Here we are just talking about wishing; a wish is not really an intent unless it is connected to an efficacious choice. Many more people would feel uncomfortable with intentionally bringing about death, not just wishing for it, even by wholly passive means. Could it not violate the sanctity of life purposely to withhold aid from India's earthquake victims in order to decrease world population? The active-passive distinction, considered apart from the question of intent, can bear still less moral weight in the case of those who are wholly dependent on us—infants, those with serious disabilities, and the very aged. To fail to preserve a dependent person is just as directly lethal as actively to kill an independent individual. To say, "I didn't kill her; I just turned off her oxygen so that she would die on her own" seems a sophistic quibble. (Although even here life is not as unequivocally violated as it would be if the oxygen in her tent were deliberately replaced with carbon monoxide.)

We need not in this Article resolve our ambivalence in the above cases of *either* causing death *or* intending death, but not *both* intending *and* causing it,²⁶⁹ and we certainly need not ask and answer the question of what inviolability in conjunction with all other moral and legal norms would require or permit. Our task is rather the premoral and prelegal one of reporting accurately and making theoretical sense of the feeling that we may not deliberately cause death but need not produce or preserve life.

We should, in passing, call attention, however, to the fact that there *are* other considerations besides sanctity that must be taken into account in judging right action. When I earlier made the claim to Dworkin that sanctity required not killing but did not require preserving life, and mentioned the above example of the monumental sculptures left to deteriorate, he criticized my view for "allowing [people] to decay and suffer."²⁷⁰ Of course I expressed no such view. I simply

cause death. . . . Yet there is no universal duty to prevent death from occurring" *Id.* at 371. The sanctity or inviolability of life requires that we not kill but does not, without more, require life's preservation.

269. For my own attempt at a resolution (focusing finally on intention rather than on causation), see Richard Stith, *Toward Freedom from Value*, 38 JURIST 48 (1978), reprinted in ON MORAL MEDICINE 127 (Stephen E. Lammers & Allen Verhey eds., 1987). Much of this and the next section of this Article is a reworking of portions of that prior essay.

270. N.Y. REV. BOOKS, *supra* note 256, at 73.

said that it was no violation of the *sanctity* of art not to cover it up, nor of the *sanctity* of life not to provide painkillers. Justice or compassion may well impose such requirements, however, as to fellow humans. Dworkin seems to want to squeeze nearly the whole moral universe—the demand to help as well as the demand not to harm—into the single idea of inviolability. Perhaps this is one reason his theory ends up so misleading.

There is clearly no way to understand the above data regarding the phenomenon of inviolability merely in terms of the intrinsic value of life. To this extent, Dworkin is right. If the value of life were set low enough to explain why we often do not want more of it and do not wish to spend extraordinary efforts preserving it, then our reluctance to kill intentionally would come to seem an irrational hang-up that should be overcome.²⁷¹ On the other hand, if the value of life were set high enough to explain why we shrink from killing, then it would demand that we maximize the production and preservation of

271. Indeed, Dworkin's rhetorical strategy, in effect if not in intent, is precisely to conflate our two intuitions in order to argue from the nonabsolute character of the duty of preservation to the nonabsolute character of the duty of nonviolation. Other advocates of occasional killing do the same. See McCormick, *supra* note 137, at 16-17. Both the Second Circuit, see *Quill v. Vacco*, 80 F.3d 716, 729-30 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996), and the Ninth Circuit, see *Compassion in Dying v. Washington*, 79 F.3d 790, 821-24 (9th Cir.), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996), treat the act-omission distinction as unimportant in this context, arguing from the seeming lack of state interest in stopping lethal withdrawal of care to a similar lack of state interest in preventing active assistance in suicide.

Of course, permission to withdraw even low-cost care need not indicate that the state does not highly value a patient's life. Both law and morality frequently permit omissions that result in a regrettable net loss to society, out of deference to self-centered human nature. See Larry Alexander, *Affirmative Duties and the Limits of Self-Sacrifice*, 15 L. & PHIL. 65, 65-66 (1996); *infra* note 385. Consistency does not require that the law permit affirmative action that results in equally regrettable net harm, because human nature can more easily accept not acting against others than it can accept sacrificing for others.

Furthermore, the omission of even life-saving care can be motivated by respect for a patient's privacy, her right to be let alone, while actively killing her obviously cannot. Therefore, the law's permission to withhold intrusive life-saving care need not imply a low valuing of the life of the person who fails to receive that care. See Judge Beezer's discussions of the "right to be free from unwanted medical treatment," citing Professor Yale Kamisar. See *Compassion in Dying*, 79 F.3d at 840, 856 (Beezer, J., dissenting) (citing Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 757 (1995)).

Even if legal permission to withdraw care did imply that the law regarded a patient's life to be of little value, this would in no way prove that the life did not retain sanctity or inviolability. Acknowledging value and acknowledging sanctity are two entirely separate stances, as shown in the next section of this Article. We shall also see there that sanctity, unlike value, demands nonviolation (nonaction) far more than it demands preservation (nonomission of care). Both Dworkin and the above courts have failed to appreciate the act-omission distinction because they have not properly conceptualized the sanctity or inviolability of human life.

human beings. Similarly, no amount of tinkering with the intrinsic value of art could explain the strange way buyer and seller treated the monumental sculptures mentioned above.

A point of still greater analytic importance: Even the belief that life or art has an absolute or infinite intrinsic value could not generate the intuitive aversion to destruction found in our sense of sanctity or inviolability, because the attitude of valuing can have no objection to destruction accompanied by the substitution of more of the infinitely valued type. In other words, valuing is inherently indifferent as between particular instances of that which is valued. Thus, no amount of valuing life or art can make individual persons or paintings inviolable.

Let us assume for the sake of argument that human life has infinite value. By this I mean that a human being is so valuable, of such great worth, that no other kind of entity (thing, relationship, or whatever) or combination of entities, can ever be preferable to such a being. In other words, insofar as we choose rationally that which is most valuable, we would *never* choose something else instead of a living human being. Consequently, we would never choose to destroy such a being, no matter what other kinds of benefits we might realize.

Nevertheless, we might well destroy such a being for the sake of the *same* kinds of benefits—human life. Indeed, if we felt that human life were of infinite value, we might well feel morally compelled to kill whenever killing would save more lives than those lost.²⁷² For example, when faced with mutual starvation in a lifeboat, we would begin to kill and eat each other.²⁷³ We also would kill a healthy person if his vital organs were absolutely needed to save a number of ailing siblings.

We might also kill for reasons other than saving life. If life were really of infinite value, but our resources were limited, would we not favor those who were most fertile or lived longest at least cost? Would

272. Note that I am assuming only that life has an infinite *exchange* value—that we would exchange an infinite amount of anything else for one life. If one life were taken to provide infinite *satisfaction*, then we would be indifferent as between preserving one life or many. This infinite satisfaction value, however, would be even less able to prevent killing than would infinite exchange value, for although it would refute the claim that we ought to kill one person to save two or fifty (by affirming that one person has as much value as fifty), it would also be indifferent to killing fifty to save one—it would affirm that no value would thus be lost.

273. See, e.g., *Queen v. Dudley & Stephans*, 14 Q.B. 273 (1884) (convicting two men of murder, but commuting the sentence to six months imprisonment, for killing and eating a fellow passenger while stranded in an open life boat for three weeks without food); cf. *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (convicting defendant of unlawful homicide, but giving light sentence of six months and twenty dollars, for throwing several passengers overboard on overlaid longboat).

we not, like some kind of prize-animal breeder, put to sleep the fat and the sick and the sterile in order to permit more people to replace them? If every single life had tremendous value, we would want as many as we could afford for as long as possible even if this meant destroying those requiring greater net care, resources, or space.

Similarly, we would not avoid comparing the lives we valued and perhaps killing as a result. Even if all lives had infinite value, we would have no rational objection to killing whenever an equal *substitute* were available. Even if I valued Mexican gold coins infinitely, I would not have any objection to returning one to the mint in exchange for an exact duplicate. So, too, I would not object to killing a newborn if she could be quickly replaced and any extra inconvenience could be compensated. Moreover, I would actually *prefer* to destroy and replace if the quality of what I had could be in any way improved. Even if I valued those coins infinitely (in that I would give *anything* else to have even one), I no doubt would return a scratched one in exchange for one without a blemish. Similarly, even though I valued every baby infinitely, relative to everything else, I would prefer to have one of maximum quality, as long as it were easy to have "defective" ones sent back to their maker and new ones substituted. No value of human life, no matter how high, can preclude killing simply to improve life's quality.

These last examples begin to reveal the reason why no amount of *valuing* of human life, not even infinite valuing, can be in harmony with our intuitive regard for life: We think that the *particular individual* matters, whereas for something we merely valued, we would accept a relevantly identical substitute. In other words, all valuing (in common with many other attitudes) is and must be for *types* (or essences), rather than for particular examples of these types. No matter how highly I value gold coins, there is no possible reason why I would prefer one to another if both partook equally of value-conferring characteristics. If we only *valued* human life, we would likewise treat people as substitutable; because we do not so treat them, we must do more than value them.

We also cannot make do with value by saying that we value the particular examples of the type, rather than the type itself. Such a clarification is no doubt true; we do not value some kind of disincarnate type called "human life" any more than I value the abstract form of gold coins. My point, however, is that as long as individuals are described as valuable only because they are human beings—examples of this type—they become substitutable. That is, insofar as I simply value the set called "individual human beings," I cannot object

to the substitution or maximization of the members of this set, even if it involves killing.

Someone might object here that I have misunderstood the way we value human beings, saying that we do not value them merely as examples of the human species, but for their qualities as "unique" persons. Concededly, there may be a uniqueness in each human being that adds to her sanctity, just as the singularity of each painting may contribute to the sanctity of art. Uniqueness, however, cannot be the whole story. There are many unique entities in the world, and they are not all inviolable. Furthermore, even if people are all unique, it seems impossible that we could value them infinitely for their unique characteristics, primarily because their differences are just not so important. I do not care about a stranger in her uniqueness (her never-to-be-repeated fingerprints or her possibly unusual facial appearance or odd sense of humor), but in her humanity. It is only her humanity, in fact, that I know with any degree of certainty. This knowledge suffices to make me reluctant to kill her. Moreover, even if each person is unique, we can hypothetically imagine the existence of absolutely identical siblings. Would our reluctance to kill one to save the others be in any degree lessened by their lack of uniqueness? I think not. They would be identical without being fungible. Obviously, something other than valuing their uniqueness must be at the root of our reticence. We must somehow explain how the *particular individual* thus matters to us (and not just to her) in the sense that we are reluctant to kill her even when she is exactly identical to her sisters.

Dworkin's turn to investment fails to explain the inviolability of life not only because he ignores the human individual as a whole, caring only about the investment in each person,²⁷⁴ but also because investment itself is only *valued* by him. Dworkin *cannot* care about particular human individuals *because* he thinks in terms only of value. His first error ignores that we are *individuals* (more than the sum of our parts) while his second error ignores that we are *particular* individuals (distinguishable even from identical brethren). As a result, Dworkin can have little hesitation about wasting one investment, no matter how highly he may value it, as long as that loss is more than counterbalanced by present or anticipated gain in other investments. Every investment is fungible. Someone who simply *values* bricks cares neither about individual churches nor even about particular bricks.

Another, quite different, way to demonstrate the arrogance of valuing toward particularity is to contrast it with the concern often found

274. See *supra* Part IV.A.

in love. There is, of course, a loose sense of the word "love" that applies to many valued objects. I might say that I love steak, horses, or diamonds, and mean little more than that I value them. Yet love in the full sense, in which we say we love God, or a spouse, or a friend, is not normally used for *things*, no matter how highly we value them. We cannot translate all value into love. More surprising the converse is also true: We cannot translate our feelings for those we love into value terminology. "I love my wife" has a very different feel to it from "I value my wife." The latter seems at first objectionable because of its instrumentalist connotation; one suspects that I care about my wife only because I have some *use* for her. The antagonism between love and value goes deeper, however. If anything, it sounds more inappropriate to eschew instrumentalism and to say, "I consider my wife to have intrinsic value."

No doubt I can speak of valuing our marriage, but to speak of my wife herself having value seems to demean her, not because of a connotation of instrumental value, but because the very idea of valuing her seems to reduce her to a good or commodity to be prized and even priced. Such an attitude is at least different from, if not incompatible with, love. I appear in some way to have set myself above her and to be evaluating and preferring her, rather than unselfconsciously delighting in her in the way of *eros* and giving myself to her in the way of *agape*. Indeed, to speak of a beloved solely in value terms seems so misguided as to be nearly absurd.

Love is radically different from valuing. Moreover, at least some lovers care about the beloved as a *particular* individual, whereas valuing regards only types. Valuing is willing to *exchange*, to accept substitutes of at least equal value. This willingness is quite appropriate for value because valuing proceeds from a value judgment, an evaluation, and it would be silly not to value two entities equally if both were judged to have the same valued characteristics—to be the same valued type. Love, by contrast, is often not willing to accept substitutes, even identical ones. Even if God were to promise me that he would immediately substitute an identical person (or more than one) for my wife if I would let him take her away, I would refuse. I do not want someone *like* her; I want *her*.

The fact that one cannot give sufficient reasons for one's love is directly related to the fact that one cares about the beloved as an individual and not as a type. Perhaps this is what we mean when we say love is an affair of the heart rather than of the mind. If one were to claim that any characteristics of the beloved could fully account for one's love, then one would be saying that anyone else of the same type

would be equally loved. Yet many lovers would not say this. Love, unlike valuing, can be for particular individuals instead of for types.

A particular entity is distinguished not by *what* it is, but by the fact *that* it is. I can think abstractly of a table, but I cannot think, for example, of the third identical table I am about to build unless I mentally insert it into space-time and imagine it existing sequentially with the first two. Only if they have different space-time coordinates can two entities of the same type be distinguished. Only if they exist in the physical world, consequently, can they be *thought* of as particular individuals; the mind otherwise knows only quantity and quality, not particulars.

Put another way, one might say that "existence" is part of the essence of an individual. In searching for a way of thinking that can respect the individuality of people, we are thus looking for a mode of thought that can take existence seriously.

Could love be the alternative to valuing for which we are searching? Could it be that we are reluctant to kill because we love other people, even strangers? Without even beginning to discuss the complex question of whether love tends to preclude killing but allow not preserving life, which the attitude for which we are looking must do, we must reject love. For although love may indeed care for individuals, in a way that valuing does not, individual love cannot be extended to all human beings. This is so, not only because love is too intimate and too scarce a commodity, but because to universalize love is to destroy its particularity. That is, if we were to love all people simply as people rather than as "John" and "Mary," we would be treating the object of love as a type—"people." Yet it is the very nontype caring of love that makes the individual matter. Therefore, we can never fully love individuals simply because they are people. Someone who says he loves people cannot mean love in our sense here and may mean rather in the sense of liking a type.²⁷⁵ Such "people-liking" may well be no more incompatible with killing individuals than is the people-valuing discussed at length above.

Love, therefore, will not work as an alternative explanation of inviolability, but it has shown us at least this much: We are looking for an attitude that finds significance in individuals, but not *only* in indi-

275. The religious person may mean that she loves God, that God loves all persons individually, and that she thus indirectly loves all those loved by her Beloved as individuals. This alternative to valuing is not insignificant, but it simply casts the conceptual problem on God. How could God love every individual as an individual simply because each is of the human type? Moreover, if God were so highly enamored of humans as such, would he not wish us to produce as many as possible?

viduals, because it must be an attitude that can be for all human beings simply because they are such. We must somehow find a way to respond to the form or type we call "human being" in a way that nevertheless cares about particular examples of this type.

In sum, we might say that our and Dworkin's problem with sanctity is, at bottom, a metaphysical one. Inviolability attaches to particular individuals, to *existing* instances of the types called "humanity" or "art" or "churches." We have to find a way to make existence matter, without exchanging the true object of our concern for some other type, call it "investment," "bricks," or whatever.

V. A RESPECT-BASED THEORY OF INVIOABILITY

To accomplish our task requires a degree of metaphysical courage. In particular, it requires that we give up our comfortable categorization of the lived world into the two boxes called "fact" and "value." Is our reticence about killing due to some empirical fact of life? If not, conventional thought takes it to be a "value judgment" about life. For such a mind-set, our proof that life cannot be consistently valued sufficiently to prevent killing could be evidence only that our reluctance to kill is irrational and arbitrary. Yet we need not think this way. As Karl Mannheim has remarked:

[T]he fact that we speak about social and cultural life in terms of values is itself an attitude peculiar to our time. The notion of "value" arose and was diffused from economics, where the conscious choice between values was the starting-point of theory. This idea of value was later transferred to the ethical, aesthetic, and religious spheres, which brought about a distortion in the description of the real behaviour of the human being in these spheres. Nothing could be more wrong than to describe the real attitude of the individual when enjoying a work of art quite unreflectively, or when acting according to ethical patterns inculcated in him since childhood, in terms of conscious choice between values.²⁷⁶

Against such economic narrowness, this Article asserts that value-language is a trap and prison of the mind and that the moral world has a multitude of curious creatures in it, many of whom are at least as fascinating as those two beasts of burden called "fact" and "value." Love is only one of them.

Let us look, then, beyond value and love, to two more attitudes often associated with sanctity and inviolability, respect and rever-

276. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 82 (1936).

ence,²⁷⁷ and see if they match up better than valuing or loving with the data we have so far gathered.

We ought first to notice that the feeling of respect, like that of love, cannot easily be translated into value-talk.²⁷⁸ I might tell a judge of my respect for her court, but I would be unlikely to tell her how I valued it. Valuing again seems connected to using, or at least implies congruence with one's desires, and the judge is normally not interested in how desirable I find her court's judgments. Just as valuing seemed unloving in regard to a spouse, so here it seems disrespectful in regard to a court. Its evaluative boldness seems to obscure a court's particular kind of dignity, no matter how highly I finally rank the court in my scale of values.

Note, too, that we cannot respect just anything we value. I can value diamonds, but do I make sense if I say, "I respect diamonds"? The answer is obvious. The important point is not that I am silly or overly materialistic, but that the sentence does not make sense. It would perhaps be wrong of me, but certainly not senseless, to say, "I value diamonds more than anything else in the world." Nor is it important here that diamonds are rarely valued as ends in themselves, or that they are merely desired but not obligatory ends. I certainly can say, "I think diamonds ought to exist for their own sake," or "Everyone has an obligation to produce a maximum number of diamonds." Yet it sounds like gibberish to say, "I respect diamonds." We would be dumbfounded by such a statement during a conversation.

Similarly, we cannot sensibly say, "I respect happiness," though certainly many value it. Happiness and diamonds just do not seem to be the proper *kinds* of objects for respect. Whether or not eudaemonism or hedonism have been refuted is irrelevant. It certainly is possible to think of happiness as having great value, yet it is not possible even to imagine it as an object of respect.

277. Dworkin uses both "respect," *LIFE'S DOMINION*, *supra* note 1, at 28, and "reverence," *id.* at 76, in this context. The 1993 German abortion decision links respect (*Achtung*) and inviolability (*Unverletzlichkeit*). See 88 BVerfGE 203, 257 (1993), 1993 EuGRZ 229, 244.

278. It is odd that in *Life's Dominion*, Dworkin slides erroneously back and forth between respect and value, given the importance that "equal concern and respect" has had for his theories of the priority of individual rights over valued collective goals. *LIFE'S DOMINION*, *supra* note 1, at 71-81. Nowhere in his prior work, however, does he seem to have carefully examined and explained the idea of respect. His book, *Taking Rights Seriously*, is about as close as he comes. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272 (1977). There he points out that to treat people with respect means treating them "as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived." *Id.* I would consider this to be a correctly described instance of the object of respect, which, in its most generalized phenomenological form, is "directed power." See *infra* note 322 and accompanying text.

If someone were to ask us why we cannot feel respect for goods of such obviously high value, we might well respond, "But they don't *do* anything! How can I say I respect them?" Agency, the ability to act or to participate in action, seems necessary (though not sufficient) for respect. So we can respect intelligence but not good looks, and courage but not praise. We respect not goods or goals, but virtues—not only moral virtues but all that might be called "directed powers."

Moreover, even if the object of valuing appears to be the same as the object of respecting, our stance toward it is quite different. "I value intelligence" has a different feel from "I respect intelligence." The former puts intelligence into my sphere of action and speaks of the preference it has; the latter steps back and accords the virtue of intelligence its own proper sphere of action. The first is a holding, and the second a releasing.

Undoubtedly, to respect people means something importantly other than to value them. Respect discerns, in a sense, the personhood of human beings as creatures able to persevere powerfully and creatively in their aims. Although this agency is often discovered in people one at a time, all human beings seem designed for at least some kinds of "virtue"—moral virtue, for example. This design itself may be enough to evoke respect. Michael Polanyi writes:

[H]owever greatly we may love an animal, there is an emotion which no animal can evoke and which is commonly directed toward our fellow men. I have said that at the highest level of personhood we meet man's moral sense, guided by the firmament of his standards. Even when this appears absent, its mere possibility is sufficient to demand our respect.²⁷⁹

If potential virtue is sufficient for respect-worthiness, then perhaps respect is the individual and universal attitude to human life that we are seeking, or again, if the human *species* generates respect in us, perhaps this feeling can be appropriate even for individual instances of that species who are in themselves unworthy of respect.

Respect is shown, above all, by acknowledgement and deference. It cannot operate, therefore, except upon an individual instance of a respected type. Primarily a matter of pausing and drawing back, it

279. MICHAEL POLANYI, *THE TACIT DIMENSION* 51 (1966). Kant, too, makes the capacity for moral action a basis for respect for humanity, although he sometimes appears to be thinking of a feeling more akin to what is below called reverence, rather than to what is here called respect. See, e.g., IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 99-101 (Lewis White Beck trans., Bobbs-Merrill Co. 1956) (1788) (discussing the transcendental freedom of humankind as a necessary prerequisite for moral law and accountability).

does not immediately commit us to production or preservation of that type. Therefore, respect may be the best way to describe our sense of the inviolability of human life.

Yet the word "reverence" competes with "respect" as the best expression of our sense of inviolability. Valuing feels demeaning in contrast to revering, just as it did in contrast to loving and respecting. The sentence "I value God" seems rather presumptuous and can hardly mean that I revere him. To talk of valuing art or law, again, is to give them less importance than to speak of reverence for them. Reverence acknowledges a nobility in its object that valuing does not, a quality we may well call sanctity or inviolability.

The nature of reverence, and its distinction from valuing, can be shown in still another way: As with respect, reverence for many objects of value would be nonsensical. Happiness and praise can no more be revered than they can be respected. They are just not the proper *kinds* of objects for reverence. We do not and cannot revere goods or goals *as such*. Therefore, we cannot revere those entities that can never present themselves to us except as desired goods or goals, and we can revere other entities that we value, such as life, only by seeing them differently than we do when valuing them.

Value is not necessary for reverence, any more than it is sufficient. One may well not like going to church, and yet behave reverently once inside. One might even resent an ugly church while feeling reverence each Sunday. Reverence, after all, harkens back to its linguistic root of *vereri*—"to fear." There is no necessary correlation between that which we fear and that which we like or value. Consequently, we may well not seek to produce or preserve many objects that evoke reverence in us—ugly churches, for example.

Curiously, the revered does not have to have the virtues of the respected. I can feel reverence for churches, even if at the same time I do not have a feeling of respect for them (because I regard them as inert objects). Only if I attribute some dynamic qualities to churches can I also feel respect for them. That which we revere does not have to have actional virtues, as did that which we respect.

Like respect, reverence need not fasten *only* upon the individual in order to make her matter. Reverence can be for types—churches or people, for example. Instead of making and having its types (as does valuing), however, reverence lets them be. Reverence is reticent and hesitant before that which has sanctity. It seeks to leave room for its object. Above all, it seeks not to violate the object of its concern. Not to violate that which we revere, however, means necessarily not to violate any individual examples of the revered. Because valuing seeks

actively to further a type, it cannot be bothered with individuals. It seeks to use them in promoting their common type. Because reverence is a largely passive withdrawing, a "letting be" of its type, it must move back from every individual instance of that type.

Does the term "respect" or the term "reverence" better express our attitude toward human life? Each has its advantages, but their usage overlaps to such a degree that I think we need not choose between them. Because respect seems slightly broader—it includes reverence more than reverence includes it—I will ordinarily use only the word "respect" in this Article. When I use it, however, I mean to refer to the idea called reverence as well as to the idea called respect. If I mean only the latter, I shall usually specify "respect in the narrow sense."

In sum, all valuing seeks to dominate the world. Individual entities as they exist have no significance; what matters is the production and preservation of various valued types. People, facts, matter—the stuff of being—become mere resources to be used in the maximization of values. All that exists is expendable, because only the abstractions we have here called types count. Even if these types are considered to have intrinsic or infinite value, rather than only an instrumental value, the individual examples of these types (including human investments and human beings) are reduced to the status of desired goods and can be destroyed and exchanged at will. No wonder, then, that valuing feels bold and arrogant in contrast to the other attitudes we have examined; a world we only value is a world entirely subject to our evaluation and control.

Respect, by contrast, eschews domination. It steps back before the type of thing cared about, and thus necessarily before every individual example of that type. A limit is given to us and to our schemes of domination. We can no longer destroy and rebuild as we wish, but must accept and accommodate being, even the being of individuals. If I respect human life, if I say it is inviolable, then rather than making and controlling it, I acknowledge and defer to it; I let it be. That which is respected is beyond the scope of our rightful judgment; even to evaluate it seems presumptuous and wrong. True, I may sometimes (but not necessarily or always) have a kind of attraction to the object of respect, but even here, my feeling is not the achieving and holding stance that accompanies valuing; it is rather an appreciative awe or delight.

Note what this means for bioethics: The much-maligned and belittled active-passive distinction turns out to be integral to the discernment of individuality. It is because valuing cannot see any difference

between actively killing and passively not preserving that it cannot discern particularity. It is because respect can see this difference that it can discern the particular.

Both universal and particular, both not violative and not necessarily productive or preservative, respect remedies the deficiencies of valuing and provides an adequate concept descriptive of our feelings and behavior toward human life and in particular of our reluctance to kill. Certainly, it does a far better job than Dworkin's idea of investment.

VI. FORTUNATE CONSEQUENCES OF RESPECTING LIFE

Is the moral significance of the inviolability of life exhausted by a rule forbidding killing? Does respect for life demand only that we not kill? It would seem not. Rather, the inviolability of life is a foundation, perhaps the only foundation, for all ethical principles that make individual people a matter of moral significance.

All moral attitudes that, like valuing, *demand* something must be indifferent as between individual examples of that which they seek. Only an attitude such as respect, which seeks to *respond* to something, necessarily has regard for every individual example of the object of its concern. Only by responding can individuals even have "reality," in the full sense of that which must be accepted and taken into account in planning how to use the things of the world.

The word given to human beings who have this reality, who have a final and fundamental moral significance, is "persons." Respect raises in the soft clay of value the hard rocks of persons. We can *recognize* persons; we can distinguish and make each one matter, not only in spite of the fact that they are all identical *qua* human, but because of this fact. Because we respect people, we cannot care only about their quantity or quality; we are suddenly aware of them as individuals who cannot be thoughtlessly sacrificed to the whole.

Respect may thus have a fundamental secular function that Dworkin has overlooked. All interpersonal morality and all human rights may be derivable from the deference shown to individual human existence, for that which has inviolability must always be seen as also an end in itself. When we defer to it, we are prevented from using it in any destructive way. Metaphorically, we are forced to leave a "space" around persons, not unlike the empty and unused space in churches on a weekday, within which they can manifest themselves. Dworkin made a terrible mistake. Inviolability is not hostile to

"waste"²⁸⁰ but requires it. The individual human is not to be fully utilized in our (or her own) investment schemes. Indeed, the sacred requires sacrifice, not investment; we must not expect a return on what we give to our children, on what passes into their inviolable space. "Rights" are simply a modern way to demarcate this "wasted" space, to delineate the details of the particulate individuality discovered through respect. In other words, the reason that Dworkin finds the inviolability of life "detached" from rights rather than being "derived" from them²⁸¹ is that respect is a *basis* for rights. Respect is primordial; rights are derivative.²⁸² The necessary supports for personal integrity, such as health, acquire a derivative sanctity that likewise demands their nonviolation. Thus, respect is not indifferent to personal flourishing, but in service and in delight waits for human fulfillment.

One clarification: My argument is that respect for *human beings* allows them to become individually important and thus to be called "persons." I am not suggesting that respect for works of art, for example, transforms them into persons. Respect makes us pause and contemplate particularity; it *permits* its object to be seen as a person. Only if that object also possesses an inner design for those virtues we associate with humanity does the word "person" become appropriate. Put another way, those particular entities that merit respect may reveal themselves to be persons if we permit them to do so, if we give them enough time and space.

Even if respect is not sufficient in itself to generate an entire moral or legal system, it is clearly necessary. Justice, in particular, requires as its necessary starting point the identification of those *to whom* one must be just. It needs both to know the type on which it is to operate—human life—and to separate this type into persons. It needs to operate on individuals, but in a world of pure value, individuals cannot easily matter. Respect for human life lets justice know where to start, lets it know for whom to ready its tools of equal regard.

Respect is thus not only more faithful than investment to the seemingly contradictory data with which we began, it also has consequences quite different from Dworkin's idea. Whereas Dworkin ignores the individual in theory and permits or requires her destruction

280. LIFE'S DOMINION, *supra* note 1, at 79.

281. *Id.* at 11.

282. Although I contend above that respect provides a basis for rights, I continue to regard the idea of rights as an imperfect construction on this foundation. The shift from the point of view of the duty-owing person to that of the benefit-receiving person undermines the sense of community. See *supra* notes 88-96 and accompanying text. For further discussion see also *infra* notes 286-292 and accompanying text.

in practice,²⁸³ respect insists on keeping her present before us. Thus respect provides a basis for justice or utility and any other ethical or legal theories that must begin by assuming some set of subjects.

Respect can do this for us because it is one of possibly many attitudes in which we discern calls or claims in the world. That is, whereas valuing tells us what should be out there in our world, respecting tells us what we must do. It discerns not values, but sources of value; not things that ought to be, but things that tell us what ought to be. When we respond appropriately, our acts may appear to be a "waste" because they are not part of a project of production or preservation, but they are better viewed as required "sacrifices."

The idea that the world contains entities to which we must respond, rather than which we must value, is not unfamiliar in everyday life. It is only strange to a modern theoretical consciousness dominated by the fact-value split. For example, when a police officer holds up her palm before us, we know that the appropriate response is to stop. We do not, however, necessarily value traffic police; we may regard them only as an annoyance. Similarly, we may feel that we should salute every time we see a flag being raised, without wishing to make or preserve flags or flagpoles. A stray cat that wanders into my home may present me with a compelling claim to food and shelter even if I do not especially like cats and even if I proceed to close my window to guard against further invasions.

As in these last two examples, it is quite possible for the calls we hear to be positive, to ask for action rather than only deference on our part. Nevertheless, those claims on us must also *include* the requirement of nonviolation or they cannot secure particularity in theory or in practice. If I can easily destroy flags or cats, I need not take them into account for long. I do not need to watch out for each one in particular. If we must respond fairly to the interests of everyone existing, but need not let them remain existing, we effectively undercut all demands of justice. If we must relieve the oppressed unless we kill them, then we will probably choose the latter and easier way. The idea of justice to the weak might never even occur to us if we could get rid of others, instead of having to deal with them when they get in our way. That justice must be founded on the inviolability of the individual is so obvious that it would not be worth stating were it not sometimes overlooked in the way we treat those with disabilities. On the one hand, we have today a great awareness of our responsibility for their just treatment. On the other hand, at least until recently, it has

283. See *supra* notes 150-275 and accompanying text.

been "common practice" to do away with newborns with severe disabilities.²⁸⁴ We seem to take a schizophrenic attitude toward these dependent people: we insist that we must treat them justly if they are around, but that we may make sure they die when they first arrive. The latter allowance must in the long run either destroy the rights even of older people with disabilities or else convert these very rights into a pressure to kill them while they are young.

Similarly, a utilitarian demand for a universally high "quality of life" masks a monstrous choice unless it is accompanied by the recognition of life's sanctity. There are two ways to ensure that everyone living has a high quality of life: raise the quality of all lives or eliminate those of low quality. Without the sanctity of life to exclude the less arduous second alternative, any increase in the urgency or degree of the quality of life demanded may lead to mass killing. Achieving top-quality life may be felt too expensive, drawn out, and problematic a process, and death may be found preferable. This may already be the plight of some newborns and other "defective" persons, but unless at some point the quality-of-life ethic is supplemented by the sanctity of life, no one with any quality deficiency can be secure. Without sanctity, we are all likely to be aided only when and to the extent that aid is cheaper than poison. Whether our "defects" are physical or mental, economic or educational, only sanctity can ensure that others see these lacks as reasons to help us rather than to destroy us.²⁸⁵

On the most abstract level, the inviolability of life ensures that people are seen as subjects rather than as objects, as definers of problems rather than as problems themselves. That there be such entities is a logical as well as a moral requirement. How can we ever know what is needed unless we first know what can have needs? If we admit the possibility that we might need to eliminate some of the needy, we undercut our every conclusion. We may not kill others even in a good cause because it is only the givenness of others that lets us discern which causes are good.

284. See John A. Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 214 (1975). Robertson speaks primarily of passive (or "negative") euthanasia. See *id.* The adoption of federal legislation in 1984 appears to have reduced the practice of infanticide somewhat. See Child Abuse Amendments of 1984, Pub. L. No. 98-457, § 121, 98 Stat. 1752; UNITED STATES COMMISSION ON CIVIL RIGHTS, MEDICAL DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES 2 (1989).

285. As Dworkin has pointed out in response to my argument, he does not advocate this kind of crass utilitarianism, which does away with inviolability entirely. See N.Y. REV. BOOKS, *supra* note 256, at 73. His investment version of inviolability would only partially mitigate these consequences, however, as discussed *supra* notes 155-212 and accompanying text.

In practice, too, far more than life itself is preserved by the rule against intentional killing. Permission to practice cannibalism *in extremis* would undercut social equality and cooperation on a lifeboat long before provisions ran out. The possibility of euthanasia, even wholly voluntary euthanasia, undercuts the relation between the dependent and their caretakers, even if that option is never exercised. If grandmother refuses optional euthanasia, she ends her life not as a respectable heroine battling in solidarity with her children against an implacable fate, but as a selfish old woman who burdens others and decreases her own dignity for no good reason at all. The possibility of infanticide converts children with disabilities from sources of meaning into burdens, even if they are allowed to live. We do not resent that which we accept as a given. Unless we fantasize about becoming birds, it never occurs to us to regret being earthbound. The inviolability of life preserves dignity in those with disabilities by insisting that they are and have always been a given, not an option, so that we do not call into question their existence.

Put another way: Options invite inegalitarian judgments of comparative value. To allow killing leads us to evaluate and so to devalue those whom we might kill, even if we do not do so, thereby reducing them from the given individuals discerned by respect to pawns expendable in our quest to maximize value.

Dworkin might respond that the *right* to life is sufficient in itself to anchor individuality and stop us from treating each other merely as utilitarian resources. Although he seeks to sever the connection between inviolability and rights, proclaiming the sense of sanctity "detached" from moral and legal rights and indicating that that sanctity may permit and even demand killing in some cases, he also insists that postnatal rights remain as a life-protective shield.²⁸⁶ Can the right to life, alone, secure equality and prevent Nietzschean contempt for dependent life? The very point of the last two chapters of Dworkin's book is that the once nearly absolute prohibition on killing the dependent should yield to other rights and interests when it is no longer supported by his special sense of inviolability.²⁸⁷ This undercutting is not surprising. Why should human equality matter if investment rather than humanness matters? Only if a person's bodily human life—her real existence in space and time—is felt to be inviolable are her equal dignity as well as her rights well founded.

286. LIFE'S DOMINION, *supra* note 1, at 98.

287. *Id.* at 179-241 (discussing euthanasia as it relates to the patient, the family, and the law).

The German Constitutional Court seemed to reason in a similar manner in its 1993 and 1975 abortion decisions. Where there is individual human existence, there is human dignity. Where there is human dignity, there is the right to life.²⁸⁸ To weaken the inviolability of life would be a step back along the path traveled by National Socialism, in which the individual lost all importance.²⁸⁹ Whether that court is right to discern human life and dignity in the fetus is a question to which we return later. Here the point is more general. The German high court holds that human dignity and human rights are inherent simply in human being.²⁹⁰ In our terms, it is respect for the inviolability of being that safeguards individual equality and human rights.

There is yet another, closely related reason why respect for life is important. Even if it were secure, a framework of rights alone would not be conducive to social solidarity. "Subjective rights," as the Europeans like to call the rights and remedies possessed by individuals, demarcate petty fiefdoms, minor sovereignties, within which each person can rule as a tyrant. The whole system of rights is often derived from an imaginary or real "social contract" among self-interested individuals. Dworkin suggests, perhaps correctly:

The United States is a nation of continental size, covering many very different and very large regions, and it is pluralist in almost every possible aspect: racial, ethnic, and cultural. In such a nation, individual rights, to the extent they are recognized and actually enforced, offer the only possibility of genuine community²⁹¹

Still, we may well ask Dworkin, what does it take for individual rights to form the basis of genuine community? Surely not just a tolerance based on mutual willfulness and selfishness, an "I won't tread on you so you won't tread on me." Would not genuine community rest better on a shared perception of the inherent dignity of individuals, a dignity transcending our choices and founding our rights?

288. 88 BVerfGE 203, 252 (1993), 1993 EuGRZ 229, 242. The German Basic Law begins with the sentence: "Human dignity is inviolable [*unantastbar*]." Grundgesetz [Basic Law] [GG] art. 1 § 1. The African Charter proclaims more directly and simply: "Human beings are inviolable." African [Banjul] Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, art. 4, reprinted in 21 I.L.M. 58 (1982), quoted in Iyona Prieto, *International Child Health and Women's Reproductive Rights*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 143, 150 n.38 (1993).

289. 39 BVerfGE 1, 67 (1975).

290. 88 BVerfGE 203, 251-52 (1993), 1993 EuGRZ 229, 242.

291. LIFE'S DOMINION, *supra* note 1, at 61.

Moreover, common commitment to respect for life, to the inviolability that undergirds all individuality, may at once be the only safe source of solidarity. All other goals, be they equality, health, fulfillment, or anything else ever so good, are dangerous because they are values, and values are indifferent to particulars. Unless accompanied by respect, all valuing is incipiently fascist, incipiently indifferent to the individual. By contrast, primarily because it is a retreat rather than a charge, respect for physical human being can be shared without becoming totalizing or collectivizing.²⁹² We can find solidarity more safely in a common reverence than in a common goal.

VII. THE AMBIVALENCE OF ABORTION REVISITED

Dworkin's theory of investment arose originally from his attempt to mediate and solve the abortion controversy.²⁹³ Reflecting upon common pro-choice and pro-life attitudes toward abortion, he came up with a theory that he thought could make sense to both sides.²⁹⁴ In response, this Article has argued that his theory is pernicious in consequence and erroneous in concept. The idea of respect expresses much more closely, and more safely, how we feel about human life. Can an understanding of respect do the political job Dworkin originally undertook? Can it provide a language that can make sense to both sides of the abortion debate? With appropriate diffidence, I would contend that the answer is "yes."

Like Dworkin, we can discern hope for a solution in two important data: even among pro-choice people there is a reluctance to abort, and even among pro-life people abortion is condemned less severely than postnatal killing. We need not claim that all pro-choice people have qualms about abortion, nor claim with Dworkin that virtually no pro-life people view abortion exactly like ordinary murder.²⁹⁵ With regard to the majority of Americans, Dworkin's two observations are surely correct. If we can make sense of them both, we will have constructed a significant bridge across the chasm that presently divides our nation. If we can come to agree on reasons why abortion is wrong and yet ought not to be punished as murder, we can hope for eventual peace in the abortion war.

292. *Life's Dominion* can be seen as a betrayal of Dworkin's *opus* as a whole, in that the latter emphasizes the importance of "equal concern and respect" as a bulwark against collectivization. See *supra* note 278 and accompanying text. His disrespect for an individual's life undercuts his respect for that individual's person.

293. *LIFE'S DOMINION*, *supra* note 1, at 10-11.

294. *Id.*

295. See *supra* notes 63-75 and accompanying text.

It seems to me obvious that people are reluctant to abort to the degree to which they think the fetus is like a baby, given the overwhelming consensus that infanticide is wrong. Moreover, discussing the nature of the newborn infant and of infanticide is about as close as we can get to the abortion controversy without entering into it. Therefore, an examination of our feeling of respect for newborn life is an appropriate way to begin to discern a possible basis for agreement with regard to unborn life.

Dworkin himself says very little about the dignity or inviolability of infant life.²⁹⁶ He does, however, address two major reasons traditionally given for why human life in general ought not to be violated: another's life is her or God's property,²⁹⁷ and it is made in the image of something noble or divine.²⁹⁸

The property explanation has a certain resonance with our theory of respect. The fact that something belongs to another is a strong reason not to harm it. Of course, the assumption of divine ownership would make us quite a bit more reluctant. Yet few feel required to contribute to God's property holdings by conceiving more of his children. The property idea, like the feeling of respect described in this Article, requires primarily that we not violate that which is owned by another, not that we produce, preserve, or otherwise value it.

A major problem for the property idea, however, particularly in its theistic form, is that it is too strong an explanation. The whole universe is made by God, just as much as are human beings, yet non-human creation does not share anywhere near the same degree of inviolability. If it is argued that God delegated to humanity his authority over his nonhuman possessions, this raises the question of why God would do so and amounts to an admission that the property notion cannot be a sufficient explanation for the special respect due to human life.

Moreover, the *feel* of property rights is too cool and insufficiently honorific to capture the sense of sanctity or inviolability. We just do not experience anything near admiration or awe for another's property, nor do we think that the respect we owe another's property responds in any way to an intrinsic characteristic of that property. Being wholly extrinsic to the thing owned, at least for our modern conscious-

296. See *supra* notes 155-171 and accompanying text.

297. LIFE'S DOMINION, *supra* note 1, at 214.

298. *Id.* at 82.

ness,²⁹⁹ ownership cannot explain our sense of the intrinsic dignity of the human individual.

Dworkin himself rightly lays much more emphasis on another explanation for the respectworthiness of human life: it is made in the "image" of God or of man.³⁰⁰ He is correct that the "dominant Western religious traditions insist that God made humankind 'in His own image,' that each individual human being is a representation and not merely a product of a divine creator."³⁰¹ The Hebrew scriptures likewise give the fact that people are made in God's image as the reason that murder must receive the most severe punishment.³⁰² Dworkin is also right in discerning a secular analogue: that a human individual is an instance, an image, of a uniquely noble form of being.³⁰³

Dworkin fails, however, to understand the scriptural or psychological import of the idea of image and of representation. He thinks it means only that each individual is "a creative masterpiece" valued primarily for the talent and effort invested.³⁰⁴ The ancient Jewish, Hellenistic, and Christian worlds, however, linked prototype and image in a unity of being.³⁰⁵ The representation re-presented the original. For those traditions, to say someone is made in God's image is to say that person is in some way divine. God's image is not just a divinely great masterpiece, as Dworkin thinks.³⁰⁶ It does not just represent divine beauty; it presents God himself to us. Reverence and respect for our neighbors is obviously called for because the one God is literally present in them. Christ can thus say: "Whatever you did to the least of my brothers, that you did to me."³⁰⁷

Pope John Paul II's recent encyclical entitled *Evangelium Vitae* (*The Gospel of Life*)³⁰⁸ harkens back to this ancient way of thinking. In answer to the question: "Why is life a good?," the Pope writes that

299. A system of entail could lead to a much greater identification of the person with her property. With ownership based on blood, and sale impossible, property would be less easily reduced to a commodity held at arm's length and convertible into money value. The Queen of England is more attached to her realm than I am to my house.

300. *LIFE'S DOMINION*, *supra* note 1, at 82.

301. *Id.*

302. *See* Genesis 9:6.

303. *LIFE'S DOMINION*, *supra* note 1, at 82.

304. *Id.*

305. II THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 389, 395 (Geoffrey W. Bromiley trans., Gerhard Kittel ed., 1964).

306. *LIFE'S DOMINION*, *supra* note 1, at 82.

307. Matthew 25:40. For further reflections on the ancient ontology of imaging and its continuing presence in modern legal consciousness, see Richard Stith, *Images, Spirituality, and Law*, 10 J.L. & RELIGION 33 (1993/94).

308. POPE JOHN PAUL II, *EVANGELIUM VITAE* para. 34, reprinted in 24 ORIGINS: CNS DOCUMENTARY SERVICE, Apr. 6, 1995, at 689, 701-02 [hereinafter *EVANGELIUM VITAE*].

human life is "a manifestation of God in the world Man has been given a sublime dignity based on the intimate bond which unites him to his Creator: In man there shines forth a reflection of God himself."³⁰⁹ The Pope writes of a bond of being between God and God's image in each human being: "The life which God offers to man is a gift by which God shares something of himself with his creature."³¹⁰ In what seems almost a direct reply to Dworkin's notion that being an "image of God" means only that each human being is "a creative masterpiece,"³¹¹ the Pope adds:

[M]an and his life appear to us not only as one of the greatest marvels of creation: For God has granted to man a dignity which is near to divine (Ps. 8:5-6). In every child which is born and in every person who lives or dies we see the image of God's glory. We celebrate this glory in every human being, a sign of the living God, an icon of Jesus Christ.³¹²

On the level of metaphysical theory, modern consciousness no longer agrees with or even understands this quasi-Platonic unity of image and prototype. We can, however, still feel that unity phenomenologically. If I guard or kiss the photo of my absent spouse or child, this is not because I think it a masterpiece but because through and in it that person is again present. St. John Chrysostom's warning against the violation of images can still make sense to us:

Do you not know that if you insult the image of the emperor, you transfer the insult to the prototype? Do you not know that if you show contempt to his image, whether it is a wooden carving or a copper statue, you will be judged not for insulting lifeless matter, but for showing the emperor contempt? Dishonor shown to the emperor's image is dishonor shown to the emperor himself.³¹³

To kill someone made in God's image is thus at least to insult, if not to injure, God himself.³¹⁴ Whether or not we can accept the ancient metaphysics of imaging, its contextual point should be clear: Human

309. *Id.*

310. *Id.* at 702.

311. *LIFE'S DOMINION*, *supra* note 1, at 82.

312. *EVANGELIUM VITAE*, *supra* note 308, para. 84, at 718.

313. ST. JOHN OF DAMASCUS, ON THE DIVINE IMAGES 68 (David Anderson trans., St. Vladimir's Seminary Press, 1980) (emphasis omitted) (quoting St. John Chrysostom).

314. Note further that according to section 2319 of the new Roman Catholic catechism, "human life . . . is sacred because the human person has been willed for its own sake in the image and likeness of . . . God." *CATECHISM OF THE CATHOLIC CHURCH* 558 (1994). This "for its own sake" would presumably not be true of most other images. Human beings are thus to be respected for their "own sake" in a way that other icons are not.

being is sacred and inviolable because it is a reflection and extension of divine being.³¹⁵

A nontheist will not, of course, agree that it is God who is imaged and present in each human being. Can we discern equally powerful nonreligious sources of individual dignity? Each of us is at the least an image and presence of humanity. To the degree that our species elicits wonder and respect, each instance of it must do so.

There is also a yet deeper and stronger reason for our respect for human form: recognition of self. We identify with others once they appear to be essentially like us. If they share our self-image, they are our "kind." As soon as another person is seen as "one of us," she becomes a cosubject, an alter ego, rather than only an object—a source of value rather than a thing to be valued. She becomes, like our own ego or self, a given and inviolable starting point for premoral and moral reflection and action. Thus the Pope founds the dignity of others also in a recognition of self: Adam knew Eve as a person because, unlike all prior creation, she was "flesh of his flesh and bone of his bones."³¹⁶ An attack on Eve was thus an attack on Adam.³¹⁷

Recognition of self in the other does not in itself ground in her an absolute inviolability, in that if suicide is possible, then the killing of other selves must also be possible. The thought of suicide, however, must surely remain anomalous. One could not function in one's everyday tasks if one's own being were felt merely a contingent thing in the world. Ordinarily, the ego or self is an unquestioned given, so that when others acquire a like status they, too, become nonoptional. Seeing another as "one of us" must at the very least make us reluctant to kill her, especially if suicide remains rare. Moreover, it can be questioned whether most suicides are as perspicacious as Hamlet's "[t]o be, or not to be."³¹⁸ Insofar as one frames the issue as, "Would it be good for me to be dead?" or, "Would I be better off if I were dead?," a wishful dualism creeps in to separate one's self from an alien body

315. Respect for art may partake of a somewhat related sanctity. Insofar as we do not fully understand how to make art, insofar as art cannot be reduced to a series of investments or to the sum of its parts, we may consider it inviolable. See *supra* note 233 and accompanying text. What is this mysterious unifying element? Some may find each work of art to be a minor miracle. Sensing the presence of the more than human, they may feel the destruction of art to be a sacrilege.

316. *EVANGELIUM VITAE*, *supra* note 308, para. 35, at 702 (quoting *Genesis* 2:23).

317. Neither the theistic nor the nontheistic theories of human dignity are "speciesist" in the sense of evincing an arbitrary preference for humanity over other species. The first type of theory would respect the divine image not only in humans but wherever it might occur—in angels, for example. The second would accord to every species capable of moral acts the duty to give special recognition to its own kind.

318. SHAKESPEARE, *supra* note 251, at act 3, sc. 2, line 64.

seen as the locus or agent of suffering. Because such a person fails to see that she is destroying herself as a subject and because she continues to treat herself as an unquestionable given, she cannot consistently objectify her fellows. Thus, the possibility of suicide need not in theory greatly weaken respect for the being of other selves. Whether a right to suicide, or to assistance therein, in practice undercuts the recognition of an inviolable self in others remains to be seen.

At the same time, recognition of other selves need not imply any sense of duty to produce them. Precisely because the world cannot be conceived without the background presence of an already existing self, any desire to produce oneself must be even more foreign than any desire for self-destruction. Therefore, the acceptance of others as cosubjects in no way implies that they are objects of which we would like to have more. The reluctance to kill, even if absolute, has no connection to a desire to procreate. In line with the theory of respect articulated above, selves can be revered and respected without being highly valued.

In what way could it be said that a newborn infant is an image of God or of ourselves? What is that divine or human image or essence, and how does it present itself in the infant? Mere body and facial shape cannot be the whole answer, for then we would feel a similar respect for the great apes and even for statues of humans, nor can the reason be the infant's rudimentary sort of consciousness or ability to feel pain, or endearing behavior, for these are shared not only by fetuses, at some stage of gestation, but by many beasts. Clearly, those attributes that may serve to distinguish our species—and that some of us would consider divine—do not arise until quite some time after birth. Human intelligence, speech, rational choice, principled conscience, sacrificial love, such qualities do not yet manifest themselves in the infant.

What the human infant does have, and other species seem not to have, is the potentiality for these things, understood not as mere possibility but as self-actualizing design.³¹⁹ There is a human form or nature at work in every baby, latent but active. An infant's smile is more than a bodily movement; it is a harbinger of communication and com-

319. In the remainder of this Article, I try to avoid the word "potentiality" because it can be used ambiguously both for possibility and for design. We can say both, "Every infant is a potential English speaker" and, "Every infant is a potential speaker." Yet there is nothing in any child specifically designed for English, whereas every child is designed, from its genes to its brain and tongue, for speech.

I should add that in preferring the word "design" I do not in any way seek to imply that merely because there is a design, there must be a designer, divine or otherwise.

munity. The image we respect and revere abides in what the child is designed to do, not yet in what the child does.

Put another way, that image is part of the infant's being, though not yet of its appearing. Appearing cannot be crucial, however. If we were to say that the actual expression of speech or of some other specifically human quality were necessary for human dignity, then that dignity would be only an epiphenomenon, an ephemeral divine flicker emerging from otherwise profane matter. People would fade out of personhood as they tired each evening, and we would entirely lose respect for their lives once they were dreamlessly asleep. This we do not do. We respect the human image even when it is not appearing, when it is subsisting merely as a capacity or, in the infant, as a self-developing potentiality.

There is yet another, related way to understand the recognition of self, the image of humanity, present in the newborn child. *Pace* Dworkin, a child is begotten, not made. In every sense, modern as well as ancient, that which parents beget is an extension of their own being. Adam's son Seth, like all sons and daughters, was "in his own likeness, after his image."³²⁰ Theological wars were once fought over whether Christ was made or begotten by the Father, precisely because it was thought that only begetting could found complete unity of image and thus of being.³²¹ The bond of origin assures the bond of being. To question the humanity of a newborn infant would be to suggest that a human being might be discontinuous, that humans might engender offspring of another species that only later turn into humans.

Moreover, the human image in an infant elicits from us more than reverence. Unlike some divine presence in a church or painted icon, the image of God or humanity in a child is dynamic rather than static. As a "directed power," it can thus call forth respect as well as reverence.³²²

Because the child is alive, in other words, its latent human image or nature strives to manifest itself. Of course, this is true of all life.

320. *Genesis* 5:30.

321. Certain followers of Arius taught that Jesus Christ was only God's first creation and thus was not God himself. The First Council of Nicea in 325 A.D. condemned the Arians and formulated the Nicene Creed. See XI THE CATHOLIC ENCYCLOPEDIA 49 (Charles G. Herbermann et al. eds., 1911). That Creed, as finally adopted at the Council of Constantinople in 381 A.D., is commonly recited by Christians even today. See *id.* It repeatedly affirms Christ's divinity by pointing to his origin as "the only begotten Son of God, and born of the Father before all ages. (God of God) light of light, true God of true God. Begotten not made, consubstantial to the Father . . ." *Id.*

322. See *supra* notes 278-279 and accompanying text.

We distinguish individual living creatures (whether or not they are human) from inanimate matter (and from nearby living creatures) by each creature's separate systemic autonomy—its capacity to regulate and direct its own equilibrium (homeostasis) rather than being entirely subject to external forces.

A pile of rocks does not reconstitute itself if it is kicked over. It does not regulate and control itself, nor does it respond and adapt to its environment. It is not an autonomous system. Any form it has is purely the product of external forces, is passive rather than active. By contrast, a living creature seeks to repair itself if it is disrupted by some external attack, not only in each part, as crystals might do, but as a whole. It monitors and governs itself, so to speak. This is what makes it a unified being in the first place, rather than just a "collection of body parts," which is what Dworkin calls Frankenstein's preactivated monster.³²³ Of course, an external attack may overwhelm and destroy a living creature, but it retains the status of a life as long as it actively resists disintegration.

My dog is thus distinct from a pile of stones because it is a single autonomous system, and the pile is not. It is distinct from other dogs—is a separate life, a *particular* dog—because it and the others have unconnected maintenance mechanisms and are not part of some larger self-governing biological system. It and other dogs are related simply in the way of rocks or in other ways that are far less perfectly integrative than biological unity.

All living creatures thus possess individuality—in the sense of undividedness, as discussed above³²⁴—in a much stronger sense than does, for example, even a uniquely great work of art. The unity of the latter, after all, is primarily in our minds; a painting does not, in any literal sense, pull itself together. In every living entity, however, there is a unifying image, an immanent form, at work in its very substance. Thus, living creatures can be much more inviolable than any artifact. When we kill a living being, we really and objectively violate a unity. When we destroy a work of art, it might be said that we only seem to do so.

Most living systems also *develop* (homeorrhexis). They do not remain static, but grow. As they grow, the parts of each system may be partially or totally replaced. The material in my cells now may be entirely different from that which I had as a child. Nevertheless, I am

323. LIFE'S DOMINION, *supra* note 1, at 19.

324. See *supra* notes 228-257 and accompanying text discussing how Dworkin's concept of investment ignores individuality.

the same living individual because I am the same system, and I am the same system because I am still governed by the same image, the same form, and the same nature. A being's historical continuity and identity is one of form, not matter.

Although we may thus feel respect for all life because of the inner dynamic shaping it, human life is unique because the power at work in it is unique. That power is designed and directed, even in the infant, toward human and (according to some) divine communion. The presence of the developing image of fulfilled humanity is what makes the infant one of our kind and accounts for our sense of the special inviolability of newborn human life over that of other species.

One source of our qualms about abortion is thus obvious and independent of any religious faith. The fetus is designed to be what the infant is designed to be. The human image is latent and active from conception, making the conceptus our kind of being, begotten by human parents and thus a member of our species. It, like the infant, is respectable as an individual human "life developing itself," in the words of the 1975 German abortion decision.³²⁵ Systemic continuity persists from conception to maturity and on to death.

Perhaps it would be helpful here to analogize fetal to photographic development. (The analogy is not perfect because photographs are usually valued rather than respected, and unlike new life, they do not monitor their own development.) Suppose I am in the process of developing a picture I know I will prize, and you come in part way through the process and destroy it. By way of mitigation, you argue, "Look, that negative was still pretty vague. So you didn't lose much." This argument is like a claim that infanticide is not so bad as killing an adult because infants are not fully developed. Similarly, to claim that early feticide is not so bad as ordinary murder is like saying, "That photo was still in the brown-smudge stage. You don't care about brown smudges, do you?" Once it is realized that the basis for human dignity in the newborn infant lies in its developing human image, the idea that early stages of life do not count as much as later stages seems outrageous, if not indeed mad.

In other words, the compelling reasons that explain the special dignity of human infants over other species also apply to embryos and fetuses. The bases of inherent dignity in the newborn also apply to

325. Jonas & Gorby, *supra* note 9, at 638. That decision spoke of the legal irrelevance of distinctions among the various stages of "*sich entwickelnden Lebens*." Judgment of Feb. 25, 1975, 39 BVerfGE 1, 37 (First Senate 1975).

the preborn, and this throughout gestation. The dignity of each stands or falls with that of the other.³²⁶

It was essentially the above argument that led the German high court in 1975 to conclude that no distinction may be drawn, with respect to the right to life, between the born and the unborn or between any prenatal stages of human development.³²⁷ To draw such a distinction would be to hold that human nature, the latent but developing human image, is insufficient for human dignity, and that some actualized human perfection is needed, thus undercutting the inherent inviolability of neonatal as well as prenatal human life. In the court's own words:

The process of development . . . is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection . . . of the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. . . . [N]o distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life.³²⁸

326. Rakowski makes a similar point in criticizing Dworkin, arguing:

A newborn's cognitive abilities are little different from those of many nonhuman animals. Yet many people think an infant deserves the same protection as older people because of what it could become. . . . But what about killing a fetus? A fetus' potential is the same as an infant's. . . . This fact motivates most moral distress over abortion

Rakowski, *supra* note 11, at 2078. See also the related argument drawn from John Rawls, *supra* note 88. There might, of course, be other theories of inviolability that could replace this image-based theory, accord with our intuition of the inherent dignity of the newborn infant, and yet not apply to those still located within the womb. To my knowledge, however, none has ever been articulated. See *supra* notes 170-171 and accompanying text; see also Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183, 195-201 (1989) (surveying extant pro-choice theories and showing that they all deny that there is anything *prima facie* wrong with killing infants).

327. See Jonas & Gorby, *supra* note 9, at 638.

328. *Id.* The 1993 case agreed, emphasizing that here:

[H]andelt es sich bei dem Ungeborenen um individuelles . . . Leben, das im Prozeß des Wachsens und Sich-Entfaltens sich nicht erst zum Menschen, sondern als Mensch entwickelt. . . . [E]s handelt sich . . . um unabdingbare Stufen der Entwicklung eines individuellen Menschseins. Wo menschliches Leben existiert, kommt ihm Menschenwürde zu. . . .

Diese Würde des Menschseins liegt auch für das ungeborene Leben im Dasein um seiner selbst willen. Es zu achten und zu schützen bedingt, daß die

Could one push this argument back further, to argue that if embryos are inviolable, then sperm cells and ova must also be? The answer is "no." Neither sperm nor egg contains a latent complete human image, nor does either grow. Dworkin writes: "[W]hen I was a just-conceived fetus",³²⁹ but he would be unintelligible if he wrote, "When I was a sperm cell" He is in fact a grown-up fetus, but he is not a grown-up sperm cell. Similarly, he could not say, "When I was still a separate sperm and ovum" because, prior to conception, the sperm and ovum are far more like nearby rocks in a collection than they are like a single organism, in that prior to conception there was no active immanent design directing those particular cells to form young Ronald. He was not there in them. They came together only through chance and external forces.³³⁰

Put another way, latent potentiality in the sense of an immanent design (image, form, essence, nature, kind, species) is radically distinct from mere possibility, as mentioned above. Either may exist without the other. Prior to conception, a new individual life is *possible*, but an active *design* has not yet come into being. Likewise, in a severely disabled person, there may no longer be any possibility of

Rechtsordnung die rechtlichen Voraussetzungen seiner Entfaltung im Sinne eines eigenen Lebensrechts des Ungeborenen gewährleistet. . . . Dieses Lebensrecht, das . . . dem Ungeborenen schon aufgrund seiner Existenz zusteht, ist das elementare und unveräußerliche Recht, das von der Würde des Menschen ausgeht

88 BVerfGE 203, 251-52 (1993). The degree of protection owed to the fetus is independent of the stage of pregnancy. *Id.* at 254. The court adds that this conclusion is valid independent of any particular religious beliefs, concerning which the legal order of a religion-and-worldview-neutral state can make no judgments. *Id.* at 252. The protection of each individual unborn life is a precondition for ordered community. *Id.* at 282. Donald Kommers notes that in Germany, unlike in America, "the most non-religious Social Democrat could agree with the most religious Christian Democrat" on the state's duty to protect the life of the unborn human at all stages of pregnancy. Kommers, *supra* note 8, at 28.

329. LIFE'S DOMINION, *supra* note 1, at 18.

330. Jim Stone would add:

If the animal which becomes an adult human being existed before conception in a divided form, then it would have existed if it had never been conceived, for if a material thing exists at a time, it exists at that time no matter what happens at a later time. Further, it follows that this animal would have existed if the egg and sperm had found different partners. Given two sperms and two eggs we have four human animals, only two of which can survive their initial stages. We are committed to the absurdity that the planet sustains billions of additional animals, each existing in a divided form from beginning to end, its cells having nothing to do with one another ever, and each cell part of countless other animals of the same kind. Plainly the human animal does not exist before conception: my body was once a fetus but never a sperm or an egg.

Jim Stone, *Why Potentiality Matters*, 17 CANADIAN J. PHIL. 815, 817 (1987) (footnote omitted).

human expression, although the striving for human perfection has not been lost. The paraplegic may never walk again. The comatose person may never again speak. Yet the body of the first is still designed for walking and that of the second still aims at speaking. Their human nature or design remains unchanged, even though it must remain unfulfilled. Insofar as the person with severe disabilities remains anything, she remains a human being, one of our kind. Her life remains therefore inviolable.

We use the idea of design in this way not only in regard to humans, but in regard to all other living creatures. A dog that has lost one leg in an accident is still called a dog, even though it is correct to say that the nature of a dog is to have four legs, and even though an otherwise dog-like animal belonging to some odd three-legged species would probably not be called a dog by us. A living entity does not join another species by being crippled. It is thus false as well as demeaning to call a person with grave disabilities a "vegetable," as Dworkin repeatedly does.³³¹ Indeed, it is only because she remains human that her condition is tragic. We do not feel saddened every time we visit someone's garden and observe all the tomatoes just vegetating there.

Recall that Dworkin was unable to explain why so many feel that the fetus somehow acquires greater dignity and inviolability once it comes to "resemble" an infant.³³² In fact, this feeling is quite understandable, though ultimately incomplete, in light of the theory developed above. If it is self-developing human nature that elicits reverence and respect in the newborn, it makes perfect sense that many would have those same attitudes toward the unborn only after the appearance of a human form, sometime around eight to ten weeks after conception.³³³ It is only thereafter that ordinary human sensibility would say naturally, "There is a baby growing in the womb." Prior to that time, it is natural to think that a baby is only being made, rather than growing—that organs are being added one by one as the embryo is gradually shaped into a human being.

Such indeed was the nearly universal premodern theory of human generation. Knowing neither of the ovum nor of conception in our modern sense, Job says to God, "Did you not pour me out like milk and curdle me like cheese?"³³⁴ Only after this "curdling" was a

331. LIFE'S DOMINION, *supra* note 1, at 180, 188, 212, 216.

332. See *supra* note 244 and accompanying text.

333. See DANIEL CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 373 (1970).

334. Job 10:10; see Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 403-04 (1979) (mentioning the nineteenth-century discovery of the existence of the ovum).

human form apparently present. Before that moment, Job sees God as an external source of activity and design, giving human form to semen. Dworkin argues that Aquinas thought that the human individual began only after the fetus received a human form and thus could take charge of its own development, although Aquinas ascribed the prior organizing design to its human father rather than directly to God, as does Job.³³⁵

We should not be surprised if such theories find less inviolability in very early life. Essentially, they imagine that the early embryo is *being constructed* (by God or by another outside force) rather than *developing*. As previously argued, things that are merely *made* lack inviolability, at least until the point that they acquire form and thus unity; an amorphous collection of stones or of body parts cannot be violated.

In truth, however, waiting for the appearance of human form in the fetus is radically mistaken. Mere bodily similarity to us cannot be the reason for the importance of resemblance or we would likewise find apes and statues inviolable. Rather, resemblance is taken by us to mean identity of nature or kind, of the latent design for human community. This design, however, is in fact present from the first moments after conception, and not as some passive blueprint for some builder to use, but as an active self-directing power. The embryo derives only food, not form, from its environment. Of course, that inherent form is not yet visible; at first it subsists only as a moving, growing complex of DNA. Yet from the beginning, a human image gives a human embryo a human nature and a continuity of being from conception to full development. Even in the *conceptus*, one can see an active human image with one's mind, though not yet with one's eyes. It is irrational to object to the destruction of a photo only after it has been partially developed but not while it is still in one's camera. Once one knows that the prized image is present, its stage of development is a triviality.

Still, both those who would date human dignity from human resemblance and those who would date it from the first presence of life developing itself see being-in-the-human-image as the object of respect, as the source of the prenatal inviolability of life. The idea of respect has led us to understand better than Dworkin why nearly all of us, nonbelievers as well as believers, feel some reluctance to abort,³³⁶

335. *LIFE'S DOMINION*, *supra* note 1, at 41-42.

336. See the survey cited by Dworkin *supra* in the text accompanying notes 59-61.

especially after the fetus resembles an infant.³³⁷ Can the idea of respect also help us to account for our second crucial datum: most of us think abortion less wrong than postnatal homicide? To this question we now turn.

Recall first that the presence of God or of oneself in another demands nonviolation more than preservation.³³⁸ This because that other is both a cosubject and a co-object. As a cosubject, she is a given, a near-absolute whose existence cannot be brought into question without undermining every form of public deliberation about ends and means. We can never know what is needed without first knowing who has needs. Yet as co-objects, one's own self and that of the other enjoy no such near-absolute status. Our separate needs are entitled to no more than equal consideration as we go about formulating joint human projects.

The above theoretical considerations are captured phenomenologically by our earlier descriptions of respect and reverence as discerning above all the inviolability of the individual.³³⁹ In responding to the claims placed upon us by that which we respect or revere, we feel a duty of nonviolation much more absolutely than we feel a duty of preservation (and we may well feel no duty at all of production). For fetuses and infants, for paintings and churches, our reluctance to violate is far more palpable than our beneficent desires to support.

Ordinarily, we have no trouble keeping these two intuitions quite separate. Most of us would never consider killing our neighbor even to gain a million dollars, while few of us would give a million dollars to save our neighbor's life. Problems come when our neighbor is already physically and morally dependent on our care, when she is disabled by infancy, age, or illness. If we omit a million-dollar operation for our child because we do not wish to impoverish ourselves, have we intentionally brought about her death, or has our lack of heroism only failed to preserve her life?

In abortion, these two intuitions—the duty not to violate and the permission not to preserve at all costs—may become absolutely counterposed. Almost every form of abortion is a direct attack on the fetus. Most involve violent dismemberment of an already partially formed body with a beating heart.³⁴⁰ Respect for life's inviolability cannot but

337. See *supra* notes 242-244 and accompanying text.

338. See *supra* note 315.

339. See *supra* Part IV.A.

340. See Irwin H. Kaiser, updating Alan F. Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, in *ABORTION, MEDICINE, AND THE LAW*, *supra* note 336, at 552, 557-63 (describing abortion techniques).

stand askance at abortion. Yet at the same time, not aborting necessarily involves a woman in great—sometimes even heroic—sacrifices aimed at preserving that fetus before and often after birth.³⁴¹ Even less than for the dependent older person, there is no morally comfortable middle way neither causing harm nor requiring sacrifice for one's unborn child. Respect for life forbids abortion, but respect also contradictorily permits not making heroic sacrifices to continue a pregnancy. Our ambivalence toward abortion is rooted in this antinomy of respect.

It could be countered that a permission is not yet a right. That respect does not require preservation at all costs could mean simply that some acts of preservation are beyond the call of this particular duty. If so, one could hardly claim a right to do a moral wrong—directly attack life—in order to avoid making an otherwise supererogatory sacrifice. Yet in the light of liberal political theory, we can understand how respect can come to seem actively pro-choice.

Few of us would think highly of parents who refused to spend a million dollars to save the life of a child at the point of death. Nevertheless, most of us would think the state to be overreaching itself if it operated upon the child and then seized the parents' million-dollar savings. We think that there are limits to the sacrifices that the state

341. The 1993 German decision argues that, unlike the ordinary prohibition of murder, forbidding abortion does more than require a pregnant woman not to violate the legal sphere of another. 88 BVerfGE 203, 256-57 (1993). It also imposes an intensive duty of concern and care lasting for many years. *Id.* It is not to be expected (*unzumutbar*) that women will sacrifice their own life values beyond a certain normal degree. *Id.* at 256-57. Curiously, the German court gives almost no emphasis to adoption as a nonlethal way to avoid extreme self-sacrifice. *Id.* By contrast, Marvin Olasky recently set up the legal abortion dilemma in the same way as this Article and the German court do—that is, as one involving a conflict between not killing another and not sacrificing oneself—but Olasky then turns to adoption as the main way to resolve the apparent antinomy. See Marvin Olasky, *The Antiabortion Movement's Future*, WALL ST. J., Dec. 3, 1995, at A14, available in 1995 WL-WSJ 9911551. He writes:

[T]wo decades of pro-life teaching and intrauterine photography have taught many Americans that creatures in the womb have beating hearts and look and move like us. . . .

[M]any Americans nonetheless view abortion as justifiable homicide, self-defense against tiny intruders who will ruin the lives of young women unless they are (with regrets) snuffed out. Unmarried pregnant women are seen to have the choice of committing homicide or suffering the life imprisonment of single parenthood. Most Americans are unwilling to force a young woman against her will into a lifetime of parental service, generally in poverty—so abortion, despite its brutality, continues to receive reluctant support. . . .

Adoption needs to be displayed as a strong bridge that gives both unwed mother and child access to a better future.

Id.

may demand of us and that we are legally, even if not morally, justified in refusing to make such sacrifices.

I am not arguing that we have no affirmative legal duties toward others. Many nations recognize a duty to rescue even strangers, when rescue is possible without significant risk to oneself.³⁴² It is obviously possible to discern duties of greater sacrifice on the part of parents toward their children—in the biological bond itself or in the knowing creation of need in another by the voluntary act of conception, for example. Even the strong legal duties of parents must have some limits, however. The law never imposes affirmative duties that are “unreasonable” under all the circumstances.³⁴³ Is a mother bound to donate a kidney to her needy child? Both kidneys, if two of her children would otherwise die? Her heart and liver as well, if needed to save their lives?

At a more generalized level, the matter may be expressed in this way: Only a collectivist, wholly utilitarian regime can insist that the common good be maximized at all costs. A liberal state must at some point consider omissions of help that result in a net loss to be nevertheless legally justified. At some point a sacrifice becomes too much for the state to demand of an individual, even if that sacrifice may be required by morality and the common good because it would cause less harm than it would prevent. In other words, parents and others must be granted a legal right to refuse assistance that is too much for the government to demand of them, even where such sacrifice, if made, would involve less loss to the parents than gain to their child. Before as well as after birth, parents have a legal right not to make extremely great sacrifices even to preserve the still greater good of their child's life.³⁴⁴

The difficulty in certain dependency relationships such as pregnancy is that a sacrifice that would ordinarily be “beyond the call of duty” may be demanded by the duty of respect. We end up with a kind of duty to go beyond the call of duty, which accounts for the curious fact that we are wont to call such sacrifices at once “required” and “heroic.”³⁴⁵ German penal jurisprudence long ago developed a

342. See Dinah Shelton, *The Duty to Assist Famine Victims*, 70 IOWA L. REV. 1309, 1313 (1985).

343. See, e.g., Regan, *supra* note 73, at 1685-86 (discussing the possibility of forced organ donation and concluding that no duty would be found).

344. See *id.* at 1588 (noting that it is unlikely a parent could be held criminally liable for not rescuing a child from a burning building).

345. Even the Pope, in his June 29, 1995, *A Letter to Women*, could not help but take note of this unusual duty to go beyond what is ordinarily the call of duty. Pope John Paul II, *A Letter to Women*, TABLET, July 15, 1995, at 917, 918. He says abortion is always a “grave sin,”

way to conceptualize failures to comply with a legal duty that turns out to involve extraordinary sacrifice: *Unzumutbarkeit*—translatable as “nondemandability” or “nonexpectability.”³⁴⁶ Even when otherwise forbidden by law, an act or omission will not be penalized if it was the only alternative to a sacrifice of one’s own interests beyond that which could reasonably be expected or demanded in the circumstances.³⁴⁷ The point here is not only that a penal threat would be ineffective, but that it would demand more than should be demanded of a person by the criminal law.

The above explanation does not wholly “solve” the politico-legal conflict over abortion. The duty not to harm and the permission not to assist remain in tension if not in contradiction. Furthermore, there will obviously be great disagreement over just how much sacrifice the state may rightly require of a woman for her unborn child. Nevertheless, the idea of respect coupled with liberal politics allows us to understand, better than Dworkin’s investment idea,³⁴⁸ the range of opinion on abortion and begins to make possible dialogue and even practical collaboration among principled opponents.

We can begin to account for the odd fact that the more religious a person is, the more likely she is to feel guilt after an abortion,³⁴⁹ even though few if any faiths claim a specific revelation regarding the permissibility of abortion, and even though nontheistic respect for the human image may well be as strong as theistic respect for the divine image. Surely part of the reason that religious people are more pro-life is that religion often calls for heroic levels of self-abnegation, and promises divine assistance, so that the burdens of even a very difficult

and yet praises as “heroic” those women who give birth after rape. *Id.* Such a juxtaposition is not entirely unique to pregnancy. A soldier ordered to face near-certain death may be punished if he refuses, yet he is paradoxically praised as a hero if he obeys. “Required heroism” is rare, however, at least in a liberal, individualistic society.

346. One of the earliest uses of this concept in criminal law occurred in the famous 1897 *Leinenfanger* decision of the *Reichsgericht*. 30 RGS 25-28 (1897). There, the court went beyond the penal code to reason that although the omission in question “considering the common good . . . could be demanded of the actor,” one must also ask whether it could be demanded of the accused under the circumstances. *Id.* at 25-28.

347. See FLETCHER, *supra* note 268, § 10.4.3, at 833 (discussing the new German Code’s synthesis of duress and necessity); Albin Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621, 624 (1976) (discussing justification and excuse in German civil law in the context of wrongfulness independent of blameworthiness). Section 35 of the German Penal Code uses the concept of *Unzumutbarkeit* in the course of defining “Excusing Necessity.” *Strafgesetzbuch* [Penal Code] § 35 (F.R.G.).

348. LIFE’S DOMINION, *supra* note 1, at 71-94 (discussing the value of life in terms of natural and human investment).

349. See, e.g., *The Abortion Dilemma: Psychological Effects*, TODAY’S STUDENT, Vol. 2, No. 24 (1979) (interview of Magda Denes).

pregnancy may come to seem bearable. Christianity, for example, holds up a high standard of required self-sacrifice: the imitation of Christ himself. Furthermore, the self-image of deeply religious people is often less promiscuous than that of others, regardless of what the behavioral reality may be, so that the nonavailability of easy abortion can seem to require fewer lifestyle sacrifices in the area of sexuality. For these reasons, religious people may be less likely to view anti-abortion legislation as posing unacceptable burdens.

At the other extreme, there are those who find even the ordinary burdens of pregnancy too much to demand. These persons often seem to ignore the normative consequences of the parental relationship and that the sacrifices of pregnancy can be avoided only by means of a legal act, both of which factors significantly increase the level of sacrifice that may be expected. Drawing and expanding on the work of Judith Jarvis Thomson,³⁵⁰ Donald Regan has argued that the traditional American lack of a duty to rescue strangers can support the result in *Roe v. Wade*³⁵¹—fully elective abortion, at least prior to viability—even assuming the legal personhood of the fetus.³⁵² Of course, many in America, especially on the political left, find that traditional lack of duty somewhat shameful.³⁵³ Yet Regan argues, with some cogency, that United States law ought then to begin imposing greater duties of affirmative assistance on everyone, not just on pregnant women.³⁵⁴ It is wrong to require women to provide life supports for fetuses while asserting that a like level of support would be too much to demand of others in equally urgent situations.³⁵⁵

350. See Thomson, *supra* note 73.

351. 410 U.S. 113 (1973).

352. See Regan, *supra* note 73, at 1641.

353. See, e.g., Editorial, *The Genovese Syndrome*, PHOENIX GAZETTE, May 27, 1995, at B10, available in 1995 WL 2797236 (discussing cases in which individuals observed crimes being committed without intervening, including the highly publicized case of Catherine "Kitty" Genovese, who was murdered in front of her apartment building in front of at least 37 witnesses); Sam Roberts, *Routine Murders in a Hurried City Numb to Pain*, N.Y. TIMES, Feb. 11, 1991, at B1 (discussing a similar incident in which witnesses to a murder failed to come forward or call the police). But see Phillip Burton, *What's a Cop's Off-Duty Duty? The Chilling Message of a Rockville Case: Don't Get Involved*, WASH. POST, Dec. 11, 1988, at C5, available in 1988 WL 2013058 (discussing a case in which a police officer is charged with assault for intervening, while off duty, in what he mistakenly, although reasonably, thought was a rape).

354. See Regan, *supra* note 73, at 1604-09.

355. See *id.* at 1571-1610 (arguing that the physical burdens involved in the duty of pregnancy and childbirth are much greater than other potential duties). Dworkin rightly finds this "no excessive sacrifice" explanation insufficient fully to justify elective abortion, for three reasons: because abortion is an act, not just an omission; because parents have duties to sacrifice themselves; and because active killing of infants in rare, like circumstances

European abortion jurisprudence has emphasized the "too much to demand" criterion in deciding which abortions should be legally permitted.³⁵⁶ The 1975 German decision held that something more than the burdens of "normal" pregnancy must be involved in order to reach the level of *Unzumutbarkeit*.³⁵⁷ Agreeing, the court in 1993 said that in order to be "not expectable," burdens must be both "so heavy and [so] unusual that they exceed the expectable limits of sacrifice."³⁵⁸ Only in such circumstances would it be wrong and futile to punish abortion.³⁵⁹

Already in 1975, the court also realized that because not aborting is always a decision to support as well as a decision not to violate, the state cannot ever significantly diminish abortion except by strengthening the willingness of women to accept at least those "normal" burdens of pregnancy and motherhood.³⁶⁰ That willingness can be encouraged in two radically different ways. Culpable abortion (abortion in which the pregnancy did not involve excessively heavy and abnormal burdens) can be punished, or birth can be encouraged. According to the 1993 court, it is rational, and therefore permissible, for the legislature to eschew the former in favor of the latter.³⁶¹ Punishment has not been very effective in stopping abortion³⁶² and is particularly ineffective in early pregnancy because often no one knows about the fetus except its mother. The state has a problem protecting life, the existence of which it is ignorant.³⁶³ In order for the child to be protected, its mother must come forward.³⁶⁴ Yet as long as abortion is punishable, women with crisis pregnancies will not come to any

would then also be legally permissible, which it is not. *LIFE'S DOMINION*, *supra* note 1, at 110-11.

356. Pro-choice scholar Luis Arroyo Zapatero argues that by focusing on non-demandability, European tribunals in general have been too begrudging in their permission for abortion, especially abortion of defective fetuses. See Luis Arroyo Zapatero, *La Indicación Eugénica*, in ESTUDIOS DE DERECHO PENAL EN HOMENAJE AL PROFESSOR LUIS JIMENEZ DE ASUA (REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD COMPLUTENSE ed., 1985).

357. 39 BVerfGE 1, 49 (1973).

358. 88 BVerfGE 203, 257, 283-84 (1993).

359. *Id.*

360. See Jonas & Gorby, *supra* note 9, at 644.

Regardless of how the state fulfills its obligation to protect, it should not be forgotten that developing life itself is entrusted by nature in the first place to the protection of the mother. To reawaken and, if required, to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavors of the state for the protection of life.

Id.

361. 88 BVerfGE 203, 265-66.

362. *Id.* at 265.

363. *Id.* at 263.

364. *Id.* at 266.

public or quasi-public agency for probirth assistance or advice.³⁶⁵ In other words, in order to reach women considering abortion with help that may convince them to give birth, it is necessary to promise them immunity should they finally end up aborting.³⁶⁶ Nothing must legally turn on the outcome of a counseling session if it is to be as effective as possible in protecting life.³⁶⁷ At least in early pregnancy, it is rational to conclude that the state may work only with rather than against the mother.³⁶⁸ Furthermore, the court reasoned that most women who commit abortion would not wish to do so if they were fully informed and empowered.³⁶⁹ The mother-child bond, even in its earliest and weakest stages, can militate against abortion and in favor of active support for the child.³⁷⁰ Even the major 1993 dissent conceded that abortion is a "self-wounding" by the pregnant woman.³⁷¹ Therefore, it is a mistake to view distressed pregnant women as necessarily hostile or indifferent to the life of the fetus, as enemies of the fetus who must be restrained by force. More abortions may well be prevented by considering pregnant women to be potential allies of their unborn children, women who would offer support but often lack the means to do so.³⁷² For these reasons, the court approved the substitu-

365. *Id.* at 282.

366. *Id.* at 282-84.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 266, 282-83. Thus the German court justifies depenalization of first trimester abortion without denying the equal dignity of the different stages of developing life, *pace* Dworkin. See *supra* note 67 and accompanying text.

371. 88 BVerfGE 203, 350.

372. According to the court, the counseling concept is built directly upon the idea that the pregnant woman, who sees herself in a situation of need and conflict, is ready to make a decision respecting the interests of her unborn child, especially once she is informed of her child's right to life. *Id.* at 284. It has become common in the United States to encounter like arguments that abortion would not be chosen by women if they were truly free to choose, in that abortion allegedly often harms women (physically or psychically), as well as killing the fetus. See *supra* note 40 for the views of Catherine MacKinnon and others on the political Left. Much relevant data can be found gathered in Cunningham & Forsythe, *supra* note 336. See also FREDERICA MATHEWES-GREEN, REAL CHOICES 17-20 (1994) (showing that women almost always choose abortion to accommodate the wishes of others who do not welcome their children); Thomas W. Strahan, *Induced Abortion As a Violation of Conscience of the Woman*, NEWSLETTER (ASSOCIATION FOR INTERDISCIPLINARY RESEARCH IN VALUES AND SOCIAL CHANGE), Sept./Oct. 1995, at 1 (claiming that most women feel some regret or guilt after abortion).

tion of counseling favoring life,³⁷³ followed by a three-day waiting period, instead of penal threats during early pregnancy.³⁷⁴

In other words, rather than fight over just how many burdens pregnant women can or should be made to bear, the Constitutional Court in 1993 mandated a regime in which the state is required both to encourage and to mitigate maternal self-sacrifice to the degree humanly possible. For the most part, abortion remains technically illegal and unsupported by public or even private health insurance, in order to teach its wrongfulness.³⁷⁵ The dignity of unborn life is to be taught in other ways as well. For example, the Constitutional Court indicates that the state has a duty to strengthen the public's will to protect unborn life in its school curricula and in all broadcast media, which are legally bound to uphold human dignity.³⁷⁶ Furthermore, the state must proactively reduce pressures to abort by insisting upon a "child-friendly" society.³⁷⁷ For example, it must ban the termination of leases as the result of the addition of a newborn child.³⁷⁸ It must guarantee that the task of raising children will not lead to discrimination at the workplace.³⁷⁹ In addition, according to the court, the state should shield the pregnant woman from pressure to abort coming from third parties—husbands, parents, or employers, for example—by enacting appropriate laws punishing such behavior, at least when it actually ends up causing an abortion.³⁸⁰ Though the court does not use ideological language, by implication it condemns the sexism, pointed out by Catherine MacKinnon and others,³⁸¹ that drives many women to

373. The court is oddly legalistic when it comes to directly strengthening the mother-child bond, relying primarily on letting the pregnant woman know of the child's own constitutional right to life. 88 BVerfGE 203, 283-85. No mention is made, for example, of letting the mother hear her child's heartbeat in early pregnancy, nor of making available ultrasound sonography later on, as a means of awakening a full appreciation of the child's presence. In the United States, this latter technology may be having a significant effect on public and personal attitudes toward the unborn. See Heidi Evans, *Womb with a View: Unborn Babies Star in Fetal Film Fests*, WALL ST. J., Nov. 30, 1993 at A1, available in 1993 WL-WSJ 673412.

374. 88 BVerfGE at 286 (citing 39 BVerfGE 1, 64 (1975)).

375. *Id.* at 319-20. Furthermore, for the state to take any part in abortion would implicate it in an "act of killing" (*Tötungshandlung*), which is permissible only if the act is proven to be lawful. *Id.* at 315-16.

376. *Id.* at 261.

377. *Id.* at 260.

378. *Id.*

379. *Id.* at 259-60.

380. *Id.* at 296-98, 308-09.

381. See MacKinnon, *supra* note 40; Tushnet, *supra* note 40. Responding to claims that various counseling features themselves express a sexist distrust of women, Gerald Neumann argues that the court's decision likewise evinces distrust of men; husbands and boyfriends may be brought into the counseling and even prosecuted. See Neumann, *supra*

abortion, and it requires the state to go about eliminating such social injustice.

In response to Dworkin's stock argument that the nonpunishment of abortion proves a lack of belief in a fetal right to life,³⁸² the court could respond that he has missed the point: nonpunishment is permissible only insofar as it is arguably more effective than penal sanctions in protecting life. Similarly, a regime depenalizing child abuse in favor of mandatory counseling need not imply any sort of second-class personhood for children, if counseling is thought more effective than penalties in preventing abuse.

Only in the face of proven hardships so extreme that it is "too much to expect" (*unzumutbar*) that a pregnant woman give birth, despite all social supports, can the state label abortion "legal" or "justified"³⁸³ and permit it to be generally covered by health insurance.³⁸⁴ In other words, faced with respect's disjunction between the duty not to harm and the permission not to aid, the court gives at least nominal priority to the former, by calling abortion "illegal" and requiring pro-

note 8, at 292. Therefore, the counseling requirements need not be seen as showing any more than a doubt about any human being's ability fairly to judge her own case, although Neumann admits they could spring from a sexist belief in the lack of independence of women. *See id.* A more radical response to this criticism of the court would be to acknowledge women's lack of independence as a brute fact in a sexist society, a condition that must be countered by counseling and support in order to free women and children from forces hostile to both. It might be noted that the only woman on the court, a Social Democrat, sided with the majority. *See Kommers, supra* note 8, at 25 n.117.

382. *See supra* text accompanying note 63. Dworkin accuses the 1975 German decision, in particular, of not really being based on a right in the unborn child. *LIFE'S DOMINION, supra* note 1, at 64.

383. 88 BVerfGE at 256-57 (citing 39 BVerfGE 1, 48ff (1973)). The court continues, as in 1975, to indicate that abortions for medical, criminological, and embryopathological reasons are legal, as well as for other emergencies of similar gravity that cannot be otherwise avoided. *Id.* Here the court appears to be reiterating the categories of the law enacted by the *Bundestag* in compliance with its 1975 decision. *Id.* at 257. There, abortion was permitted in the first twelve weeks of pregnancy to avoid danger to the mother's life or grave injury to her physical or mental health. *Id.* Abortion after sexual assault, in the case of grave harm to the health of the child, or in other similar emergencies was legally deemed to satisfy this life-or-health criterion. *Id.* at 215.

384. Unlike the 1975 decision, however, the 1993 opinion does not permit abortion insurance coverage in the last, open-ended category of "similar emergencies." *Id.* at 312-20. Although it concedes that continuation of pregnancy may sometimes be nonexpectable in such unspecified situations, it argues that the vagueness of this category opens it to abuse and would interfere with the counseling process by giving the mother an incentive to prove to the counselor that her conflict was irresolvable. *Id.* at 273-76, 312-20. Public funds may, however, be used to fund all abortions for the poor in order to provide a necessary incentive for them to come in for counseling. *Id.* at 316-17. The court's principle is that abortion for other than clearly provable hardship must be treated as unlawful by the entire legal order except when the counseling system could not function without acting as if the abortion were lawful. *Id.* at 279-80.

life counseling and support, except when the sacrifice asked by the state would be inevitably overwhelming.³⁸⁵

385. *Id.* at 257, 283-84. In 1975, it appeared plausible that the Constitutional Court considered such hardship abortions only to be excused. See *New Constitutional and Penal Theory*, *supra* note 10, at 545-51. George Fletcher treats *Unzumutbarkeit* as an excuse. See FLETCHER, *supra* note 268, § 10.4.3, at 833. Other German courts, however, later made clear that such abortions were legally justified, and in 1993, the Constitutional Court agreed to this label. 88 BVerfGE 325-26. Hardship abortions can be justified in the penal law even though they violate the fundamental right to life of the child and even though the state continues to have an affirmative duty to protect that life. *Id.* at 257. A right to at least some hardship abortions might even be required by the Basic Law. The court left this issue open in 1993. *Id.* at 255.

How could the 1993 court decision call hardship abortion "justified" rather than only "excused"? How could the court suppress the duty not to harm in favor of the right not to aid without giving up the principle of an equal human dignity and right to life before birth and at all stages of pregnancy? Its opinion contains no clear answer. It certainly does not try to claim that the fetus is some kind of aggressor or intruder against whom force might be justified.

Perhaps, by analogy, the court would argue that a mountain climber who has a companion (voluntarily) tied to his leg and dangling over an abyss would be thought by us "justified" in actively cutting the rope in order to prevent gangrene, even at the cost of killing the companion. Would we mean "justified," however, in the sense of "required by duty" or even "favored by law"? Would the law *urge* the climber to cut off his companion? I think not. When we say that severing the rope is justified, we mean, rather, that it would be *unjustified* for the state to demand the sacrifice of a leg to save a life. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.4, at 441-43 (2d ed. 1986) (discussing the public policy behind the justification of necessity). We would rather have him lose his leg than have his companion lose his life, but it would nevertheless be wrong of us to impose a legal duty to accept gangrene. We call his act justified not because we fully approve of it, but because we wish to emphasize the limits of state power. See *id.*

In like manner, it may be that the court does not really mean to say that hardship abortions are fully justified, despite the state's pragmatic material cooperation with them. Although there is no doubt that the court repeatedly uses the German term for "justified," *gerechtfertigt*, with regard to these hardship abortions, the 1993 decision also insists that the state seek to prevent these same justified abortions by counseling and other nonpenal means mentioned above. 88 BVerfGE 257. The 1975 decision likewise required the state to try to convince women of their "duty" (*Pflicht*) to continue pregnancy even if abortion would be legally justified. See Jonas & Gorby, *supra* note 9, at 654-55.

States often, of course, grant rights that they would prefer not to see exercised. Many of us would be happier if others exercised less often their rights to drink or smoke, to promote pornography or revolution, or to refuse to heroically rescue their neighbors. The law sometimes permits a violent response to aggression even when retreat is possible, especially when retreat would involve slight risk. See RESTATEMENT (SECOND) OF TORTS § 65(2)(a) (1981). In such circumstances, might we not say that the victim of the aggression has a right to resist, but that we wish she would retreat instead? It makes perfect sense to say that although someone may have a legal right to walk past a baby drowning in a puddle, the human community urges the passerby to stop and render assistance. We might even say that she is legally justified, though not morally correct, in refusing to retreat or to rescue. See *id.* § 314 cmt. c (noting that one is under no legal duty to render aid to another, even if the danger is great, merely by realizing the other is in danger). If we spoke this way we would not mean justified in a very strong sense, however, especially if we insisted that nonrescuers listen to our plea for rescue before walking by. We would have used the word "justified" only in the weak sense of "legally permitted," and not in the

In broadest outline, the Constitutional Court claims to further a solution to the abortion debate that is both pro-choice and pro-life, not in some newly stipulated meaning but in the very sense intended by the partisans of these two camps.³⁸⁶ German abortion jurisprudence can be seen to be pro-choice because it does not penalize informed choices for early abortion.³⁸⁷ It can also be seen as pro-life in that the court is using what are arguably the most effective means at its disposal to encourage respect for life. In so doing, German abortion law incorporates our deep ambivalence about abortion, both our feeling that the living human individual is inviolable and our sense that the liberal state must not overreach itself by demanding under penalty that women give birth regardless of the cost.

There may or may not be a way to achieve full theoretical coherence between our sense of respect and our sense of freedom. I am not sure that the German opinions have done so. They do, however, point the way toward practical measures that may lessen our sense of contradiction. Even people who think abortion justified or excused, and who thus oppose its penalization, might agree to measures designed to encourage a choice for life.³⁸⁸ Furthermore, many such people might agree with Germany that birth is too much to expect of a woman only insofar as it requires her to bear burdens that are both "heavy" and "unusual."³⁸⁹ Aid to women in resisting sexist and other pressures to abort could make childbearing less severely burdensome and thus more expectable. Likewise, demanding greater levels of sacrifice by men and other nonpregnant people (for example, reintroduction of the draft or legally required blood or marrow donation

strong sense of "legally favored." Perhaps this is the sort of weak justification intended by the Constitutional Court. Perhaps, although abortion in hardship cases is not condemned by the legal order; it is only a "liberty," not something the law encourages or promotes.

My own judgment remains that the language of excuse would capture our sympathy for hardship abortion better than that of justification. It is easy not to blame women who have abortions in difficult circumstances, without giving up the principle of the inviolability of life. To adhere to that principle while calling an act of lethal violence—not just an omission—justified seems much more difficult. Still, the court must be credited with a solution that seeks to incorporate both liberal deference to self-interest and communitarian encouragement to self-sacrifice—by supporting those who refuse to be heroines even while pleading for heroism. 88 BVerfGE 203 (1993).

386. Kommers indicates that the German judicial debate has built "bridges between people of opposing views." Kommers, *supra* note 8, at 29.

387. 88 BVerfGE 203.

388. Both Kommers and Neumann have suggested that the United States Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), may *permit* more or less the same degree of fetal protection that the German court *requires*, namely, measures aimed at persuading (rather than coercing) women to give birth. See Kommers, *supra* note 8, at 32; Neumann, *supra* note 8, at 292.

389. 88 BVerfGE, 203, 257, 283-84.

by parents to children) would make pregnancy's level of burden less unusual.³⁹⁰ As these two processes advanced, abortion could come to seem less justified or excused to many who now support it.³⁹¹ They might still not think penalization the best route to prevention, but they would support other forms of state action protective of unborn life.

CONCLUSION

In *Life's Dominion*, Ronald Dworkin has tried to make sense of a common sort of ambivalence concerning the fetus. Many people seem to value the fetus as less than a human being with equal rights but more than the sort of potentiality found in sperm and egg prior to conception. In order to explain this significant but less-than-equal fetal value, Dworkin suggests that we must be valuing the investment that goes into a human being as it is conceived and as it matures, first before and then after birth.³⁹² Traditional terms such as the "sanctity" and "inviolability" of human life express our concern that this investment not go to waste at any time during someone's life, according to Dworkin.³⁹³

This critique of Dworkin's theory of inviolability has argued that his theory is dangerous, mistaken, and unnecessary: To reduce the inviolability of life to a mercantilist notion of avoiding waste endangers various sorts of vulnerable people whose continued lives seem wasteful to some. Moreover, Dworkin's turn to investment mistakenly ignores the human individual who is the real focus of our moral intuitions. Most important, value-based reasoning, as used by Dworkin and many others,³⁹⁴ cannot discern the significance of particular entities; it unthinkingly undercuts not only the right to life but individual dignity and equality as well. Finally, Dworkin's effort was unnecessary because there are more plausible ways to resolve any ambivalence we may have concerning abortion, without criminalizing it.

390. These other sacrifices might not have to be quite as burdensome as those of childbirth in order to make continuation of pregnancy "expectable." When the alternative is an act of violence, we may well feel that more sacrifice can be expected than when the alternative is merely an omission of aid. Nevertheless, the sacrifices borne by pregnant women are unlikely to be felt acceptable if they seem wholly out of line with the burdens carried by others.

391. Such views from the political Left were noted at the beginning of this Article. See *supra* note 40.

392. *LIFE'S DOMINION*, *supra* note 1, at 68-101; see *supra* text accompanying notes 111-135 (discussing Dworkin's investment-based theory of inviolability).

393. *LIFE'S DOMINION*, *supra* note 1, at 68-101.

394. See *supra* note 5.

The central datum overlooked by Dworkin is the attitude called respect. Respect cannot be converted into value. It is a separate and significant stance toward human beings and other entities. The core of this Article has been a description of the nature and effects of the idea of respect.